

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 240 and 249b**

**Release No. 34-76620; File No. S7-25-15**

**RIN 3235-AL53**

**Disclosure of Payments by Resource Extraction Issuers**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing Rule 13q-1 and an amendment to Form SD to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers. Rule 13q-1 was initially adopted by the Commission on August 22, 2012, but it was subsequently vacated by the U.S. District Court for the District of Columbia. Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act of 1934, which directs the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information about those payments in an interactive data format.

**DATES:** We are providing two comment periods for this proposal. Initial comments are due on January 25, 2016. Reply comments, which may respond only to issues raised in the initial comment period, are due on February 16, 2016. In developing the final rules, the Commission may rely on both new comments and comments that have been received to date, including those that were provided in connection with the prior rules that the Commission issued under Section 13(q).

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment forms (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-25-15 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-25-15. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE,

Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at [www.sec.gov](http://www.sec.gov) to receive notifications by e-mail.

**FOR FURTHER INFORMATION CONTACT:** Shehzad K. Niazi, Special Counsel; Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430; or Elliot Staffin, Special Counsel; Office of International Corporate Finance, Division of Corporation Finance, at (202) 551-3450, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are proposing Rule 13q-1<sup>1</sup> and an amendment to Form SD<sup>2</sup> under the Securities Exchange Act of 1934 ("Exchange Act").<sup>3</sup>

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<sup>1</sup> 17 CFR 240.13q-1.

<sup>2</sup> 17 CFR 249.448.

<sup>3</sup> 15 U.S.C. 78a *et seq.*

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## **I. INTRODUCTION AND BACKGROUND**

On August 22, 2012, the Commission adopted a rule and form amendments<sup>4</sup> (the “2012 Rules”) to implement Section 13(q) of the Exchange Act. The 2012 Rules were vacated by the U.S. District Court for the District of Columbia by order dated July 2, 2013. In light of the court’s order, we are re-proposing Rule 13q-1 and proposing an amendment to Form SD to implement Section 13(q).

### **A. Section 13(q) of the Exchange Act**

Section 13(q) was added in 2010 by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Act”).<sup>5</sup> It directs the Commission to “issue final rules that require each resource extraction issuer to include in an annual report . . . information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.”<sup>6</sup>

Based on the statutory text and the legislative history, we understand that Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and

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<sup>4</sup> See Exchange Act Release No. 67717 (Aug. 22, 2012), 77 FR 56365 (Sept. 12, 2012) [available at](http://www.sec.gov/rules/final/2012/34-67717.pdf) <http://www.sec.gov/rules/final/2012/34-67717.pdf> (the “2012 Adopting Release”). See also Exchange Act Release No. 63549 (Dec. 15, 2010), 75 FR 80978 (Dec. 23, 2010) [available at](http://www.sec.gov/rules/proposed/2010/34-63549.pdf) <http://www.sec.gov/rules/proposed/2010/34-63549.pdf> (the “2010 Proposing Release”).

<sup>5</sup> Pub. L. No. 111-203 (July 21, 2010).

<sup>6</sup> 15 U.S.C. 78m(q)(2)(A). As discussed further below, Section 13(q) also specifies that the Commission’s rules must require certain information to be provided in interactive data format.

mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals. As discussed in more detail below, the legislation reflects U.S. foreign policy interests in supporting global efforts to improve transparency in the extractive industries. The goal of such transparency is to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.<sup>7</sup>

Section 13(q) provides the following definitions of several key terms:

- “resource extraction issuer” means an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals;<sup>8</sup>
- “commercial development of oil, natural gas, or minerals” includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;<sup>9</sup>

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<sup>7</sup> See, e.g., 156 CONG. REC. S3816 (daily ed. May 17, 2010) (Statement of Senator Lugar, one of the sponsors of Section 1504) (“Adoption of the Cardin-Lugar amendment would bring a major step in favor of increased transparency at home and abroad. . . . More importantly, it would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues. . . . The essential issue at stake is a citizen’s right to hold its government to account. Americans would not tolerate the Congress denying them access to revenues our Treasury collects. We cannot force foreign governments to treat their citizens as we would hope, but this amendment would make it much more difficult to hide the truth.”); *id.* at S3817-18 (May 17, 2010) (Statement of Senator Dodd) (“[C]ountries with huge revenue flows from energy development also frequently have some of the highest rates of poverty, corruption and violence. Where is all that money going? [Section 13(q)] is a first step toward addressing that issue by setting a new international standard for disclosure.”).

<sup>8</sup> 15 U.S.C. 78m(q)(1)(D).

<sup>9</sup> 15 U.S.C. 78m(q)(1)(A).

- “foreign government” means a foreign government, a department, agency or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;<sup>10</sup> and
- “payment” means a payment that:
  - is made to further the commercial development of oil, natural gas, or minerals;
  - is not de minimis; and
  - includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (“EITI”) (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>11</sup>

Section 13(q) specifies that “[t]o the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”<sup>12</sup> As noted above in the definition of “payment,” the statute explicitly refers to an international initiative, the EITI.<sup>13</sup>

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<sup>10</sup> 15 U.S.C. 78m(q)(1)(B).

<sup>11</sup> 15 U.S.C. 78m(q)(1)(C).

<sup>12</sup> 15 U.S.C. 78m(q)(2)(E).

<sup>13</sup> The EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations. The coalition was formed with industry participation and describes itself as being dedicated to fostering and improving transparency and accountability in resource-rich countries through the publication and verification of company payments and government revenues from oil, natural gas, and mining. See *Implementing EITI for Impact-A Handbook for Policymakers and Stakeholders* (2011) (“EITI Handbook”), at xii. A country volunteers to become an EITI candidate and must complete an EITI validation process to become a compliant member. Currently 49 countries are EITI implementing countries. See <https://eiti.org/countries/> (last visited Dec. 8, 2015). Of those, 31 have achieved “EITI compliant” status, four have their EITI status temporarily suspended, and the rest are implementing the EITI requirements but are not yet compliant. Id. Several countries not currently a part of the EITI have indicated

Although the separate provision in Section 13(q) about supporting the Federal Government’s commitment to international transparency efforts does not explicitly mention the EITI,<sup>14</sup> the legislative history indicates that the EITI was considered in connection with the new statutory provision.<sup>15</sup> On March 19, 2014, the United States completed the process of becoming an EITI candidate country,<sup>16</sup> with its first mandatory report due within two years of the approval of its application.<sup>17</sup> In re-proposing rules, we have considered the guidance in the EITI Standard and EITI Handbook on what should be included in a country’s EITI plan,<sup>18</sup> as well as reports made by EITI member countries.

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their intention to implement the EITI. See <https://eiti.org/countries/other> (last visited Dec. 8, 2015).

<sup>14</sup> 15 U.S.C. 78m(q)(2)(E).

<sup>15</sup> See, e.g., 156 CONG. REC. S3816 (daily ed. May 17, 2010) (Statement of Senator Lugar) (“This domestic action will complement multilateral transparency efforts such as the Extractive Industries Transparency Initiative—the EITI—under which some countries are beginning to require all extractive companies operating in their territories to publicly report their payments.”).

<sup>16</sup> When becoming an EITI candidate, a country must establish a multi-stakeholder group, including representatives of civil society, industry, and government, to oversee implementation of the EITI. The stakeholder group for a particular country agrees to the terms of that country’s EITI plan, including the requirements for what information will be provided by the governments and by the companies operating in that country. Generally, under the EITI, companies and the host country’s government submit payment information confidentially to an independent administrator selected by the country’s multi-stakeholder group, which is frequently an independent auditor. The auditor reconciles the information provided to it by the government and by the companies and produces a report. While the information provided in the reports varies among countries, the reports must adhere to the EITI requirements provided in the EITI Standard (2013). See the EITI’s website at <http://eiti.org> (last visited Dec. 8, 2015).

<sup>17</sup> In December 2012, the U.S. government established a multi-stakeholder group, the USEITI Advisory Committee, headed by the Department of the Interior (“DOI”) and including the Departments of Energy and Treasury, as well as members of industry and civil society. See Multi-Stakeholder Group List of Members, at [http://www.doi.gov/eiti/FACA/upload/List-of-Members\\_03-16-15.pdf](http://www.doi.gov/eiti/FACA/upload/List-of-Members_03-16-15.pdf). USEITI’s current plans include producing its first report in December 2015, and producing its second report and submitting it to the EITI board in December 2016. See 2015 Workplan - USEITI, available at [http://www.doi.gov/eiti/FACA/upload/WORKPLAN-2015-12\\_19\\_14-final.pdf](http://www.doi.gov/eiti/FACA/upload/WORKPLAN-2015-12_19_14-final.pdf). See also letter from Department of Interior Office of Natural Resources Revenue (Nov. 6, 2015) (“DOI 1”).

<sup>18</sup> The EITI Standard encompasses several documents fundamental to the EITI: (1) the “EITI Principles,” which set forth the general aims and commitments of EITI participants; (2) the “EITI Requirements,” which must be followed by countries implementing the EITI; (3) the “Validation Guide,” which provides guidance on the EITI validation process; (4) the “Protocol: Participation of Civil Society,” which provides guidance regarding the role of civil society in the EITI; and (5) documents relevant to the governance and management of the EITI

Pursuant to Section 13(q), the rules must require a resource extraction issuer to submit the payment information included in an annual report in an interactive data format<sup>19</sup> using an interactive data standard established by us.<sup>20</sup> Section 13(q) defines “interactive data format” to mean an electronic data format in which pieces of information are identified using an interactive data standard.<sup>21</sup> It also defines “interactive data standard” as a standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.<sup>22</sup> Section 13(q) also requires that the rules include electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the Federal Government:

- the total amounts of the payments, by category;
- the currency used to make the payments;
- the financial period in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- the government that received the payments and the country in which the government is located; and
- the project of the resource extraction issuer to which the payments relate.<sup>23</sup>

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(e.g., the EITI Articles of Association, the EITI Openness Policy, and the draft EITI Code of Conduct). The EITI Handbook provides guidance on implementing the EITI, including overcoming common challenges to EITI implementation.

<sup>19</sup> 15 U.S.C. 78m(q)(2)(C).

<sup>20</sup> 15 U.S.C. 78m(q)(2)(D).

<sup>21</sup> 15 U.S.C. 78m(q)(1)(E).

<sup>22</sup> 15 U.S.C. 78m(q)(1)(F).

<sup>23</sup> 15 U.S.C. 78m(q)(2)(D)(ii).

Section 13(q) further authorizes the Commission to require electronic tags for other information that we determine are necessary or appropriate in the public interest or for the protection of investors.<sup>24</sup>

Section 13(q) requires, to the extent practicable, that the Commission make publicly available online a compilation of the information required to be submitted by resource extraction issuers under the new rules.<sup>25</sup> The statute does not define the term compilation.

Finally, Section 13(q) provides that the final rules “shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year . . . that ends not earlier than one year after the date on which the Commission issues final rules . . . .”<sup>26</sup>

## **B. The 2012 Rules and Litigation**

We adopted final rules implementing Section 13(q) on August 22, 2012.<sup>27</sup> In October 2012, the American Petroleum Institute (“API”), the U.S. Chamber of Commerce, and two other

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<sup>24</sup> Id.

<sup>25</sup> 15 U.S.C. 78m(q)(3).

<sup>26</sup> 15 U.S.C. 78m(q)(2)(F).

<sup>27</sup> We received over 150 unique comment letters on the 2010 Proposing Release, as well as over 149,000 form letters (including a petition with 143,000 signatures). The letters, including the form letters designated as Type A, Type B, and Type C, are available at <http://www.sec.gov/comments/s7-42-10/s74210.shtml>. In addition, to facilitate public input on the Act before the official comment periods opened, the Commission provided a series of e-mail links, organized by topic, on its website at <http://www.sec.gov/spotlight/regreformcomments.shtml>. The public comments we received on Section 1504 of the Act, which were submitted prior to the 2010 Proposing Release, are available on our website at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml>. Many commenters provided comments prior to, in response to, and after the 2010 Proposing Release. Comments received after the 2012 Adopting Release are available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml>.

industry groups challenged the 2012 Rules.<sup>28</sup> On July 2, 2013, the U.S. District Court for the District of Columbia vacated the rules.<sup>29</sup> The court based its decision on two findings: first, that the Commission misread Section 13(q) to compel the public disclosure of the issuers' reports; and second, the Commission's explanation for not granting an exemption for when disclosure is prohibited by foreign governments was arbitrary and capricious. On September 18, 2014, Oxfam filed suit in the U.S. District Court for the District of Massachusetts to compel the Commission to promulgate a final rule implementing Section 1504. Oxfam asked the court to compel the Commission to:

- issue a proposed rule within 30 days of the granting of summary judgment in its favor or on August 1, 2015, whichever comes first;
- open a 45-day period for public notice and comment; and
- promulgate a final rule within 45 days after the end of said period, with the final rule promulgated no later than November 1, 2015.

On September 2, 2015, the court issued an order holding that the Commission unlawfully withheld agency action by not promulgating a final rule.<sup>30</sup> The court concluded that despite the earlier adoption of final rules and vacatur by the U.S. District Court for the District of Columbia, “the duty to promulgate a final extraction payments disclosure rule remains unfulfilled more than four years past Congress’s deadline.” The Commission filed an expedited schedule for

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<sup>28</sup> See API et al. v. SEC, No. 12-1668 (D.D.C. Oct. 10, 2012). Petitioners also filed suit in the U.S. Court of Appeals for the D.C. Circuit, which subsequently dismissed the suit for lack of jurisdiction. See API v. SEC, 714 F. 3d 1329 (D.C. Cir. 2013).

<sup>29</sup> See API v. SEC, 953 F. Supp. 2d 5 (D.D.C., 2013) (“API Lawsuit”).

<sup>30</sup> See Oxfam America, Inc. v. United States Securities and Exchange Commission, Civil Action, No. 14-13648 (DJC), 2015 WL 5156554 (D. Mass. Sept. 2, 2015).

promulgating the final rule with the court on October 2, 2015. Pursuant to that proposed expedited schedule, the Commission would vote on the adoption of a final rule in June 2016.<sup>31</sup>

### **C. Developments Subsequent to the 2013 Court Decision**

Since the U.S. District Court for the District of Columbia's decision in 2013, the European Parliament and Council of the European Union have adopted two directives that include payment disclosure rules similar to the 2012 Rules.<sup>32</sup> The EU Accounting Directive and the EU Transparency Directive (the "EU Directives") determine the baseline requirements for oil, gas, mining, and logging companies to disclose annually the payments they make to governments on a by country and by project basis.<sup>33</sup> The EU Accounting Directive regulates the provision of financial information by all "large" companies<sup>34</sup> incorporated under the laws of a European Economic Area ("EEA") member state.<sup>35</sup> It requires covered oil, gas, mining, and

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<sup>31</sup> In the Notice of Proposed Expedited Rulemaking Schedule, the Commission also advised the court of several factors that may result in variation from the proposed expedited schedule. These factors include the overall volume of the Commission's work, the Commission's inability to guarantee a favorable vote from a majority of its Commissioners, and the possibility that exigencies may arise that may make it impracticable for the Commission to meet the proposed deadline (e.g., a government shut-down, relevant international developments, unexpected relevant legal developments).

<sup>32</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings ("EU Accounting Directive"); and Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC on the implementation of certain provisions of Directive 2004/109/EC (the "EU Transparency Directive").

<sup>33</sup> Unlike the 2012 Rules and the proposed rules, the EU Directives also apply to companies active in the logging of primary forests.

<sup>34</sup> See Article 3(4) of the EU Accounting Directive, which defines large companies ("large undertakings") to mean those which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet totaling €20 million (approximately \$21.4 million (USD) as of Nov. 10, 2015); (b) net turnover of €40 million (approximately \$42.8 million (USD) as of Nov. 10, 2015); and (c) average number of employees of 250. Neither the 2012 rules nor the proposed rules have a size limitation.

<sup>35</sup> The EEA is composed of the EU Member states plus Iceland, Liechtenstein and Norway.

logging companies to disclose specified payments to governments. The EU Transparency Directive applies these disclosure requirements to all companies listed on EU-regulated markets<sup>36</sup> even if they are not registered in the EEA or are incorporated in other countries.<sup>37</sup> The EU Directives determine the applicability and scope of the requirements and set the baseline for what has to be reported in each member country. Member states are, however, granted some leeway for when the report is due and what penalties will result from violations of the regulations.<sup>38</sup> Companies' required public disclosure of payments in an annual report is anticipated to begin in 2016 in all European Union and EEA member states once the essential provisions have been effectively incorporated into domestic law in each country.<sup>39</sup>

The EU Directives are similar to the 2012 Rules in that they require disclosure of the same payment types on a per project and per government basis and do not provide any exemption from the disclosure requirements. Further, each of these regulations also requires

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<sup>36</sup> The term "regulated market" is defined in the EU's Markets in Financial Instruments Directive 2004/39/EC ("MiFID"), as amended by 2010/78/EU. The list of regulated markets can be found on the European Securities and Markets Authority's website at [http://mifidatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=23&language=0&pageName=REGULATED\\_MARKETS\\_Display&subsection\\_id=0&action=Go&ds=8&ms=9&ys=2015&mic\\_code=MIC%20Code&full\\_name=Full%20Name&cpage=0](http://mifidatabase.esma.europa.eu/Index.aspx?sectionlinks_id=23&language=0&pageName=REGULATED_MARKETS_Display&subsection_id=0&action=Go&ds=8&ms=9&ys=2015&mic_code=MIC%20Code&full_name=Full%20Name&cpage=0) (last visited Dec. 8, 2015).

<sup>37</sup> See EU Transparency Directive, Art. 2(1)(d) and Art. 6.

<sup>38</sup> See, e.g., Article 45 of the EU Accounting Directive ("The report . . . on payments to governments shall be published as laid down by the laws of each Member State . . ."); Id. at Article 51 ("Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive . . .").

<sup>39</sup> The requirements of the EU Directives are implemented through the enacting legislation of each EU Member State. The deadlines for implementing the EU Accounting Directive and the EU Transparency Directive are July 20, 2015 and November 26, 2015 respectively. In general, non-EU EEA countries enact implementing legislation after an EU Directive is adopted into the EEA by Joint Committee decision. The EEA Joint Committee adopted the Accounting Directive on October 30, 2015 and the Transparency Directive is awaiting decision (as of November [6], 2015). As of November [6], 2015, Austria, Croatia, the Czech Republic, Denmark, Germany, Hungary, Italy, Lithuania, Portugal, Slovakia, Spain, and the United Kingdom have filed notifications of full transposition of the Accounting Directive with the European Commission. Norway, a non-EU member of the EEA, has adopted legislation that complies with both the Accounting and Transparency Directives, effective for fiscal years beginning on or after January 1, 2014. Other EU and EEA member countries are working towards implementation.

public disclosure of payment information, including the issuer's identity. There are, however, significant differences from the 2012 Rules. One difference is that the EU Directives define the term "project,"<sup>40</sup> whereas the 2012 Rules left this term undefined.<sup>41</sup> Another difference is that the EU Directives allow issuers to use reports prepared for foreign regulatory purposes to satisfy their disclosure obligations under EU law if those reports are deemed equivalent pursuant to specified criteria while the 2012 Rules do not contain such a provision.<sup>42</sup>

Canada also has adopted a federal resource extraction disclosure law, the Extractive Sector Transparency Measures Act ("ESTMA"), which is similar to the 2012 Rules.<sup>43</sup> ESTMA, like the EU Directives, allows for the Minister of Natural Resources Canada to determine that the requirements of another jurisdiction are an acceptable substitute for the domestic requirements.<sup>44</sup> For example, on July 31, 2015 the Minister determined that the reporting requirements in the EU Directives were an acceptable substitute for Canada's requirements under ESTMA.<sup>45</sup> The draft

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<sup>40</sup> See, e.g., Article 41(4) of the EU Accounting Directive.

<sup>41</sup> The Commission did not define the term "project" in the 2012 Rules, but it did provide guidance on its meaning in the 2012 Adopting Release, stating that "resource extraction issuers routinely enter into contractual arrangements with governments for the purpose of commercial development of oil, natural gas, or minerals. The contract defines the relationship and payment flows between the resource extraction issuer and the government, and therefore, we believe it generally provides a basis for determining the payments, and required payment disclosure, that would be associated with a particular 'project'." 2012 Adopting Release at 85-86 [77 FR 56385].

<sup>42</sup> See, e.g., Article 46-7 of the EU Accounting Directive. Another significant difference is that the EU Directives cover logging activities in addition to the extractive industry. See, e.g., Article 42(1) of the EU Accounting Directive ("Member States shall require . . . entities active in the extractive industry or the logging of primary forests to prepare and make public a report on payments made to governments on an annual basis.").

<sup>43</sup> See Extractive Sector Transparency Measures Act, 2014 S.C., ch. 39, s. 376 (Can.), which came into force on June 1, 2015.

<sup>44</sup> See ESTMA, Section 10(1) ("If, in the Minister's opinion, and taking into account any additional conditions that he or she may impose, the payment reporting requirements of another jurisdiction achieve the purposes of the reporting requirements under this Act, the Minister may determine that the requirements of the other jurisdiction are an acceptable substitute . . .").

<sup>45</sup> Extractive Sector Transparency Measures Act – Substitution Determination, available at <http://www.nrcan.gc.ca/acts-regulations/17754> (last visited Dec. 8, 2015).

guidance and technical reporting specifications under ESTMA also include project-level reporting using the same definition as the EU Directives.<sup>46</sup> Unlike the EU Directives and the 2012 Rules, which did not provide for any exemptions unique to resource extraction payment disclosure, ESTMA authorizes the adoption of regulations respecting, among other matters, “the circumstances in which any provisions of this Act do not apply to entities, payments or payees.”<sup>47</sup> As of the date of this release, the Minister of Natural Resources Canada has not authorized any regulations pursuant to that provision that provide for exemptions under ESTMA.

In addition to the developments in the European Union and Canada, which govern a large percentage of the companies that would be impacted by our proposed rules,<sup>48</sup> there have been significant developments in the EITI’s approach since the 2012 Rules. In the 2012 Adopting Release, we noted that the EITI’s approach at the time was fundamentally different from Section 13(q) in that companies would generally submit payment information confidentially to an independent administrator selected by the country’s multi-stakeholder group who then used that information to produce a report.<sup>49</sup> That report could have presented aggregated data if the multi-stakeholder group approved of such presentation. Since then, in order to elicit more

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<sup>46</sup> See draft Extractive Sector Transparency Measures Act – Guidance (“ESTMA Guidance”). The Minister of Natural Resources of Canada has recommended the adoption of a definition of project that is identical to the EU Directives’ definition of project. See Natural Resources Canada, Extractive Sector Transparency Measures Act- Technical Reporting Specifications, § 2.2.2 (Aug. 1, 2015), available at [http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical\\_Reporting\\_Specifications\\_EN.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical_Reporting_Specifications_EN.pdf). Although the ESTMA Guidance is currently in draft form, we assume for purposes of this proposal that it and the related draft ESTMA – Technical Reporting Specifications (“ESTMA Specifications”) will be finalized in substantially similar form prior to the effective date of our final rules under Section 13(q). We will continue to evaluate any developments in the ESTMA Guidance, ESTMA Specifications, and their impact on our approach prior to the adoption of our final rules.

<sup>47</sup> See ESTMA, Section 23(1).

<sup>48</sup> See Section III.B.2.b below for our estimate of the number of companies that would be fully affected by the proposed rules.

<sup>49</sup> See 2012 Adopting Release, n.27 and accompanying text.

intelligible, comprehensive, reliable, and accurate information,<sup>50</sup> the EITI has revised its standard to require the report to include payment disclosure by each company, rather than aggregated data, and project level disclosure if consistent with the EU and Commission rules.<sup>51</sup>

Since the 2012 Rules were vacated, numerous parties have also submitted comment letters to the Commission and have met with members of the Commission or the staff.<sup>52</sup> These commenters provided recommendations on how the Commission could structure the rules required by Section 13(q) in light of the U.S. District Court for the District of Columbia's decision and the international developments described above. Through this process, the Commission also has become aware that a number of extractive industry companies around the world have voluntarily undertaken to make detailed disclosures of their resource extraction payments to foreign governments.<sup>53</sup> We have reviewed and considered the comments received and the rules we are proposing reflect such consideration.

#### **D. Summary of Proposed Rules**

In general, the proposed rules, which are described in more detail in Part II below, would require resource extraction issuers to file a Form SD on an annual basis that includes information

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<sup>50</sup> See History of EITI (“The Board undertook an extensive strategy review to address . . . [h]ow to ensure that the EITI provided more intelligible, comprehensive and reliable information . . . . The resulting EITI Standard . . . therefore sought . . . [b]etter and more accurate disclosure . . . .”) available at <https://eiti.org/eiti/history> (last visited Dec. 8, 2015).

<sup>51</sup> See EITI Standard, at 6, 31.

<sup>52</sup> Copies of the letters and meeting memoranda relating to these matters are available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml>.

<sup>53</sup> See, e.g., letters from Kosmos Energy (Oct. 19, 2015) (“Kosmos”); Statoil ASA (Feb. 22, 2011) (“Statoil”); and Columbia Center on Sustainable Investment (Oct. 30, 2015). See also BHP Billiton, Economic Contribution and Payments to Governments Report 2015 available at <http://www.bhpbilliton.com/~media/bhp/documents/investors/annual-reports/2015/bhpbillitoneconomiccontributionandpaymentstogovernments2015.pdf?la=en>.

about payments related to the commercial development of oil, natural gas, or minerals that are made to governments. The following are the key provisions of the proposed rules:

- The term “resource extraction issuer” would apply to all U.S. companies and foreign companies that are required to file annual reports pursuant to Section 13 or 15(d) of the Exchange Act and are engaged in the commercial development of oil, natural gas, or minerals.
- The term “commercial development of oil, natural gas, or minerals” would mean exploration, extraction, processing, and export, or the acquisition of a license for any such activity, consistent with Section 13(q).
- The term “payment” would mean payments that are made to further the commercial development of oil, natural gas, or minerals, are “not de minimis,” and includes taxes, royalties, fees (including license fees), production entitlements, and bonuses, consistent with Section 13(q). We also propose including dividends and payments for infrastructure improvements in the definition. In addition, we propose defining “not de minimis” to mean any payment, whether a single payment or a series of related payments, that equals or exceeds \$100,000 during the most recent fiscal year.
- In addition to the payments it makes directly, a resource extraction issuer would be required to disclose payments made by its subsidiaries and other entities under its control. An issuer would disclose those payments that are included in its consolidated financial statements made by entities that are consolidated or proportionately consolidated, as determined by applicable accounting principles.

- The term “project” would be defined. We propose to define it in a manner similar to the EU Directives, using an approach focused on the legal agreement that forms the basis for payment liabilities with a government. In certain circumstances this definition would also include operational activities governed by multiple legal agreements.
- The term “foreign government” would mean a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government, consistent with Section 13(q).
- The term “Federal Government” would mean the United States Federal Government.
- The proposed rules would require a resource extraction issuer to file its payment disclosure on Form SD, on the Commission’s Electronic Data Gathering, Analysis, and Retrieval System (“EDGAR”), no later than 150 days after the end of its fiscal year. Form SD would require issuers to include a brief statement directing users to detailed payment information provided in an exhibit.
- Recognizing the discretion granted to us under Section 13(q), the proposed rules would require issuers to disclose the payment information publicly, including the identity of the issuer.
- The proposed rules would not include any express exemptions. Instead, resource extraction issuers could apply for, and the Commission would consider, exemptive relief on a case-by-case basis.<sup>54</sup>

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<sup>54</sup> See Sections 12(h) and 36(a) of the Exchange Act (15 U.S.C. 78l(h) and 78mm(a)).

- In light of recent developments in the European Union and Canada, as well as the developments with the U.S. Extractive Industries Transparency Initiative (“USEITI”), Form SD would include a provision by which resource extraction issuers could use a report prepared for foreign regulatory purposes or for USEITI to comply with the proposed rules if the Commission deems the foreign jurisdiction’s applicable requirements or the USEITI reporting regime to be substantially similar to our own.
- Resource extraction issuers would be required to present the payment disclosure using the eXtensible Business Reporting Language (“XBRL”) electronic format and the electronic tags identified in Item 2.01 of Form SD. These tags would include those listed in Section 13(q), as well as tags for the type and total amount of payments made for each project, the type and total amount of payments made to each government, the particular resource that is the subject of commercial development, and the subnational geographic location of the project.
- Resource extraction issuers generally would be required to comply with the rules starting with their fiscal year ending no earlier than one year after the effective date of the adopted rules.

**E. Objectives of Section 13(q)’s Required Disclosures and the Proposed Rules**

Section 13(q) reflects U.S. foreign policy interests in supporting global efforts to improve the transparency of payments made in the extractive industries. The use of securities law disclosure requirements to advance foreign policy objectives is uncommon, and therefore foreign

policy is not a topic we routinely address in our rulemaking.<sup>55</sup> Nonetheless, because Congress has directed the Commission to issue rules effectuating Section 13(q), we have sought to understand the governmental interests that the statute and rules are designed to serve, and to determine the best way to structure our rules so as to further those governmental interests.

Accordingly, we have carefully examined the legislative history, relevant materials from the Executive Branch, and the many comments we have received, in order to develop our understanding of the objectives of Section 13(q). To assist us further in understanding the governmental interests, Commission staff consulted with relevant staff from the Department of State, the Department of the Interior, and the U.S. Agency for International Development.<sup>56</sup> Commission staff also conferred with representatives from the Canadian and British governments, as well as a representative of the European Union. As outlined below, these sources and consultations have helped form our view that Section 13(q) and the rules required thereunder are intended to advance the important U.S. foreign policy objective of combatting global corruption and, in so doing, to potentially improve accountability and governance in

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<sup>55</sup> In this regard, we note that there are only two other Federal securities law disclosure requirements that appear designed primarily to advance U.S. foreign policy objectives. The first is Section 13(p) of the Exchange Act [15 U.S.C. 78m(p)], which was added in 2010 by the Act. Section 13(p) directs the Commission to adopt rules requiring certain disclosures regarding the use of conflict minerals originating in the Democratic Republic of the Congo. The other disclosure provision is Section 13(r) of the Exchange Act [15 U.S.C. 78m(r)], which was added by the Iran Threat Reduction and Syria Human Rights Act of 2012. Section 13(r) is a self-executing provision that requires a reporting company to include in its annual and quarterly reports disclosure about specified Iran-related activities, and transactions or dealings with persons whose property and interests are blocked pursuant to two Executive Orders relating to terrorism and the proliferation of weapons of mass destruction. Pub. L. No. 112-158 (Aug. 10, 2012).

<sup>56</sup> See Section 13(q)(2)(B) (expressly authorizing the Commission in developing the rules under Section 13(q) to “consult with any agency or entity that the Commission determines is relevant”).

resource-rich countries around the world.<sup>57</sup> In light of our understanding, the disclosure that we are proposing to require of resource extraction issuers (i.e., company specific, project-level, public disclosure of information relating to payments made to a foreign government for the purpose of the commercial development of oil, natural gas, or minerals) is designed to further these critical U.S. interests.

### **1. The U.S. Government’s Foreign Policy Interest in Reducing Corruption in Resource-rich Countries**

An important component of the U.S. foreign policy agenda is “to stem corruption around the world and hold to account those who exploit the public’s trust for private gain.”<sup>58</sup> Indeed, “[t]he United States has been a global leader on anti-corruption efforts since enacting the first foreign bribery law, the Foreign Corrupt Practices Act (FCPA), in 1977.”<sup>59</sup> For example, “[t]he United States was a leader in developing fundamental international legal frameworks [to combat corruption] such as the UN Convention against Corruption and the Organization for Economic

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<sup>57</sup> See, e.g., letters from United States Department of State (Nov. 13, 2015) (“State Department”) (“[Section 13(q)] directly advances the United States’ foreign policy interests in increasing transparency and reducing corruption in the oil, gas, and mineral sectors.”); DOI 1.

<sup>58</sup> The White House, Fact Sheet: The U.S. Global Anticorruption Agenda (Sept. 24, 2014) (“White House Fact Sheet”) available at <https://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda> (“Preventing corruption preserves funds for public revenue and thereby helps drive development and economic growth. By contrast, pervasive corruption siphons revenue away from the public budget and undermines the rule of law and the confidence of citizens in their governments, facilitates human rights abuses and organized crime, empowers authoritarian rulers, and can threaten the stability of entire regions.”). See also letter from State Department (“Efforts to promote transparency and good governance, and combat corruption are at the forefront of the [State] Department’s diplomatic and development efforts.”).

<sup>59</sup> White House Fact Sheet. See also Press Statement, Secretary of State John Kerry, U.S. Welcomes International Anticorruption Day (Dec. 9, 2014) (“Kerry Statement”) available at <http://www.state.gov/secretary/remarks/2014/12/234873.htm> (“[T]he United States is using a variety of tools, including bilateral diplomacy, multilateral engagement, enforcement, and capacity building assistance, to advance our anticorruption agenda.”); Secretary of State Hillary Rodham Clinton, Speech at the Transparency International-USA’s Annual Integrity Award Dinner (Mar. 22, 2012) (“Clinton Transparency Speech”) (describing how the United States has “made it a priority to fight corruption and promote transparency”).

Cooperation and Development (OECD) Anti-Bribery Convention[.]”<sup>60</sup> And “[t]he United States has also been a leader in providing funding for capacity building to fight corruption and promote good governance.”<sup>61</sup>

One area of particular concern for the U.S. Government is corruption within the governments of developing countries that are rich in oil, gas, or minerals.<sup>62</sup> Indeed, it has been explained that “[h]igher levels of corruption present the most obvious political risk that can arise from large holdings of natural resources. The short run availability of large financial assets [*i.e.*, revenues from natural resources] increases the opportunity for the theft of such assets by political leaders.”<sup>63</sup>

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<sup>60</sup> White House Fact Sheet. See generally OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Dec. 17, 1997) available at [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

<sup>61</sup> White House Fact Sheet. See also Kerry Statement (“[W]e renew our notice to kleptocrats around the world: continued theft from your communities will not be tolerated . . . .”); Clinton Transparency Speech (stating that “[c]orruption is a key focus of our strategic dialogue with civil society”); Staff of Senate Committee on Foreign Relations, 110<sup>th</sup> Cong., *The Petroleum and Poverty Paradox*, at 17 (Oct. 2008) (“Senate Report”) (“One of the five ‘key objectives’ of U.S. foreign assistance is to ensure that recipient countries are ‘governing justly and democratically,’ which for developing countries means that foreign aid is directed to ‘support policies and programs that accelerate and strengthen public institutions and the creation of a more vibrant local government, civil society, and media.”). See generally The White House, Fact Sheet: Leading the Fight Against Corruption and Bribery (Nov. 11, 2014) available at <https://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-leading-fight-against-corruption-and-bribery>) (“The United States continues to lead in providing funding for capacity building to fight corruption and promote good governance.”).

<sup>62</sup> See, e.g., White House Fact Sheet (explaining that “the United States is taking several actions to ensure that extractives companies and governments remain accountable”); letter from State Department (“Efforts to increase transparency have been a high priority for this Administration as part of the United States’ good governance promotion, anti-corruption, and energy security strategies.”). See also Testimony of Secretary Hillary Rodham Clinton, Senate Foreign Relations Committee Hearing on National Security and Foreign Policy Priorities in the FY2013 International Affairs Budget (Feb. 28, 2012) (explaining that “everybody is benefited by the disinfectant of sunshine and the spotlight to hold institutions accountable” and the Section 13(q) disclosures “complement[] other efforts at transparency that [the U.S. Government is] committed to”); Senate Report, at 17 (“[I]n the summer of 2008, the State Department, under a provision of the FY2008 State appropriations bill, issued new guidance to embassies to revoke or deny visas to high-level foreign officials involved in extractive industries corruption.”).

<sup>63</sup> MACCARTAN HUMPHREYS, JEFFREY D. SACHS & JOSEPH E. STIGLITZ, *ESCAPING THE RESOURCE CURSE* (2007), at 11 (“ESCAPING THE RESOURCE CURSE”). See also, Simon Dietz, Eric Neumayer, & Indra de Soysa, *Corruption, the Resource Curse, and Genuine Saving*, ENVIRONMENT DEVELOPMENT ECONOMICS (2007)

The costs of such corruption to the national economies of these resource-rich developing countries can be “enormous.”<sup>64</sup> Many experts and policymakers in this area contend that such corruption “is central to explaining why resource-rich countries perform badly in terms of socio-economic development, a phenomenon that has been termed the resource curse.”<sup>65</sup> The State Department has similarly explained that “[c]orruption and mismanagement of these resources can impede economic growth, reduce opportunities for U.S. trade and investment, divert critically needed funding from social services and other government activities, and contribute to instability and conflict.”<sup>66</sup> Whatever form the relationship between corruption and the resource

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(noting that “[t]he availability of resource rents may give rise to corruption”). See generally Senate Report, at 12 (explaining that “transparency in extractive industries abroad is in [U.S.] interests because mineral wealth breeds corruption, which dulls the effects of U.S. foreign assistance”); ESCAPING THE RESOURCE CURSE, at 11 (noting that “statistical studies that seek to account for variation in levels of corruption across different countries find that natural resource dependence is a strong predictor”); Global Witness, *Oil Revenue Transparency* (Mar. 2007) (“In all, 26 of the world’s 36 oil-rich countries rank among the bottom half of the world’s most corrupt countries.”); letter from Civil Society Coalition on Oil and Gas in Uganda (May 18, 2015) (“CSCU”) (explaining that revenues from extractive activities are a “major vector for corruption and malfeasance in the extractive sectors”).

<sup>64</sup> ESCAPING THE RESOURCE CURSE, at 11.

<sup>65</sup> Ivar Kolstad and Arne Wiig, *Is Transparency the Key to Reducing Corruption in Resource Rich Countries?* World Development (Feb. 2009). See also, Simon Dietz, Eric Neumayer, & Indra de Soysa, *Corruption, the Resource Curse, and Genuine Saving*, ENVIRONMENT DEVELOPMENT ECONOMICS (2007) (discussing the “persuasive theoretical and empirical arguments in the literature that suggest corruption may be a major explanatory factor in the resource curse”); Carles Leite & Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth*, IMF (July 1999) (discussing a regression analysis demonstrating that “long-term growth is negatively affected by the level of corruption”); Senate Report, at 10 (“The resource curse is the product of multiple factors including . . . [i]ncreases in incentives for corruption and political rent-seeking when large commodity revenue streams are available[.]”). See generally ESCAPING THE RESOURCE CURSE, at 1 (“Countries with large endowments of natural resources, such as oil and gas, often perform *worse* in terms of economic development and good governance than do countries with fewer resources. Paradoxically, despite the prospects of wealth and opportunity that accompany the discovery and extraction of oil and other natural resources, such endowments all too often impede rather than further balanced and sustainable development.”) (emphasis in original); Bank Information Center & Global Witness, *Assessment of IMF and World Bank Group Extractive Industries Transparency Implementation* (Oct. 2008) (“[M]any resource-rich countries are among the most corrupt and the poorest countries in the world.”).

<sup>66</sup> Letter from State Department.

curse may take in a given resource-rich developing country, many believe that the two are closely connected.<sup>67</sup>

In recent years, a global consensus has begun to emerge that increasing revenue transparency through the public disclosure of revenue payments made by companies in the resource extraction sector to foreign governments can be an important tool to help combat the corruption that resource-rich developing countries too often experience.<sup>68</sup> For example, as discussed above, since 2002 an international coalition that includes various foreign governments, international organizations, and resource extraction issuers has maintained the EITI, which seeks to improve public transparency and accountability in countries rich in oil, natural gas, or

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<sup>67</sup> At least one potential explanation for the relationship between resource-revenue corruption and poor socio-economic performance is that resource revenues tend to “produce weak state structures that make corrupt practices considerably easier for government officials.” ESCAPING THE RESOURCE CURSE, at 11. The weak state structures, in turn, may result from the fact that “resource-rich governments receive so much revenue from rents that they have little need for taxation” and, therefore, can operate in a manner that is less accountable to the general public. Caitlin C. Corrigan, *Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative*, RESOURCE POLICY (2014). It has been argued that “[s]uch governments have lower motivation to push through development enhancing proposals or remain democratic.” *Id.* See generally ESCAPING THE RESOURCE CURSE, at 257 (“Simply stated, petroleum dependence turns oil states into ‘honey pots’—ones to be raided by all actors, foreign and domestic, regardless of the long-term consequences produced by this collective rent-seeking.”).

<sup>68</sup> See, e.g., letter from State Department (explaining that transparency has been “widely identified as a key component of the fight against corruption in this sector”); Liz David-Barrett & Ken Okamura, *The Transparency Paradox: Why Do Corrupt Countries Join EITI?* Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) (explaining that transparency initiatives “have become a key part of the anti-corruption toolkit on the assumption that sunlight is the best disinfectant”); Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT’L AFF. 25 (2011) (“Transparency has emerged as the most broadly recommended policy response to poor governance records in resource-rich states and their damaging developmental effects.”). See also ESCAPING THE RESOURCE CURSE, at 26 (“The central problem facing resource-rich countries may be easily stated: Various individuals wish to divert as much of that endowment as possible for their own private benefit. Modern economic theory has analyzed the generic problem of inducing agents (here government officials) to act in the interests of those they are supposed to serve (the principals, here the citizens more generally). Agency problems arise whenever information is imperfect, and hence there is a need to emphasize *transparency*, or improving the openness and availability of information in an attempt to control corruption.”) (emphasis in original).

minerals.<sup>69</sup> As also discussed above, the European Union and Canada have both enacted resource extraction payment disclosure requirements.<sup>70</sup> Moreover, the World Bank requires “revenue transparency as a condition on new investments in [extractive industries].”<sup>71</sup> The International Monetary Fund similarly seeks to promote such transparency in developing countries.<sup>72</sup>

In accordance both with the U.S. Government’s long-standing foreign policy objective to reduce global corruption and with the increased appreciation that resource extraction payment transparency may help combat corruption, Congress in 2010 enacted the Section 13(q) public disclosure requirement.<sup>73</sup> Section 13(q) directly embodies this governmental purpose, providing

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<sup>69</sup> See Senate Report, at 14 (describing as “[k]ey EITI goals” the “prevent[ion] [of] revenue-related corruption” and the “promotion [of] public fiscal transparency and political accountability”).

<sup>70</sup> Another example of an international transparency effort is the amendments to the Hong Kong Stock Exchange listing rules for mineral companies. See Amendments to the GEM Listing Rules of the Hong Kong Stock Exchange, Chapter 18A.05(6)(c) (effective June 3, 2010), available at [http://www.hkex.com.hk/eng/rulesreg/listrules/gemrulesup/Documents/gem34\\_miner.pdf](http://www.hkex.com.hk/eng/rulesreg/listrules/gemrulesup/Documents/gem34_miner.pdf) (requiring a mineral company to include in its listing document, if relevant and material to the company’s business operations, information regarding its compliance with host country laws, regulations and permits, and payments made to host country governments in respect of tax, royalties, and other significant payments on a country by country basis).

<sup>71</sup> World Bank, *Striking a Better Balance—the World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review* (Sept. 17, 2004).

<sup>72</sup> See IMF, *Guide on Resource Revenue Transparency* (2007) (“A high immediate priority should be given to improving the quality and public disclosure of data on resource revenue transactions . . . . The public availability of information on all resource-related transactions is central to fiscal transparency.”). See generally Senate Report, at 3 (“The World Bank and the International Monetary Fund have both launched efforts to improve accounting and transparency of extractive industry revenues, and to make it harder for government officials to hide corruption—and easier for citizens to demand that the money be spent wisely.”).

<sup>73</sup> The legislative history demonstrates that, by at least 2008, Congress became aware that a mandatory disclosure regime was needed to complement the voluntary EITI regime to achieve significant international gains in payment transparency. See, e.g., Transparency of Extractive Industries: High Stakes for Resource-Rich Countries, Citizens, and International Business, Hearing before the Committee on Financial Services, U.S. House of Representatives (No. 110-75) (Oct. 25, 2007) at 7 (testimony of Ian Gary) (“EITI may make progress in some countries where political will to tackle the problem is strong and lasting, and requires the active involvement of civil society. But the initiative is weakened by its voluntary nature and will not capture many countries where problems are most severe.”). As explained in a 2008 Senate Foreign Relations Committee report:

expressly that “[t]o the extent practicable, the rules issued [under the provision] shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”<sup>74</sup> The legislative history underlying the enactment of Section 13(q) further confirms that the provision was intended to help combat corruption by increasing public transparency of resource extraction payments and, in so doing, to potentially enhance accountability and governance in resource-rich developing countries.<sup>75</sup> And since the enactment of Section 13(q), the President and the State Department

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United States and multilateral efforts to promote extractive industries transparency are intended to work within the bounds of the political will and technical capacity of the resource-rich countries. With their revenue windfall, some of these nations are increasingly intransigent in resisting outside pressure. This has led some to urge that the U.S. should take steps domestically to promote transparency overseas, much as the Foreign Corrupt Practices Act was U.S. domestic legislation to thwart corruption abroad. One such proposal is to mandate revenue reporting for companies listed with the Securities and Exchange Commission and working in extractives abroad.

Senate Report, at 20. This report’s findings served as the basis for Section 13(q). See 156 CONG. REC. S3816 (May 17, 2010) (Statement of Senator Lugar) (explaining that Section 13(q) “builds on the findings” of this report); id. at S3817 (May 17, 2010) (Statement of Senator Dodd). See also id. S3818 (May 17, 2010) (Statement of Senator Dodd) (stating that “broad new requirements for greater disclosure by resource extractive companies operating around the world[] would be an important step” to complement the EITI’s “voluntary program”).

<sup>74</sup> Section 13(q)(2)(E).

<sup>75</sup> See, e.g., 156 CONG. REC. S3816 (May 17, 2010) (Statement of Senator Lugar) (explaining that the provision will help combat the problem where “[t]oo often, oil money intended for a nation’s poor ends up lining the pockets of the rich or is squandered on showcase projects instead of productive investments”); id. at S3976 (May 19, 2010) (Statement of Senator Feingold) (explaining that the provision will “require companies listed on U.S. stock exchanges to disclose in their SEC filing extractive payments made to foreign governments for oil, gas, and mining . . . . This information would then be made public, empowering citizens in resource-rich countries in their efforts to combat corruption and hold their governments accountable.”); id. at S5913 (July 15, 2010) (Statement of Senator Leahy) (“[Section 13(q)] will enable citizens of these resource-rich countries to know what their governments and governmental officials are receiving from foreign companies in exchange for mining rights. This will begin to hold governments accountable for how those funds are used and help ensure that the sale of their countries’ natural resources are used for the public good.”). We note that the legislative history also indicates that Congress intended for the Section 13(q) disclosures to serve as a potential informational tool for investors. See, e.g., id. at 3316 (Statement of Senator Cardin) (May 6, 2010) (“The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors.”).

have emphasized the important role that disclosure pursuant to Section 13(q) is intended to have in helping to combat corruption in resource-rich countries.<sup>76</sup>

## **2. Reasons for Proposing Issuer-specific, Project-level, Public Disclosures of Resource Extraction Payments**

Given the important governmental interests underlying Section 13(q) and this rulemaking, we have considered the manner in which the public disclosure of resource extraction payments might best promote those governmental interests. As detailed in Section II of this release, we are proposing a requirement for company-specific, project-level, public disclosure. By “project-level” reporting, we refer to “project” as defined by our proposed rules—a definition that is generally based on the operational activities that are governed by a single contract, license, lease, concession or similar legal agreement and that forms the basis for payment liabilities.<sup>77</sup> We believe that such company-specific, project-level payment transparency is

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<sup>76</sup> See, e.g., President Barack Obama, *Speech Before the United Nations General Assembly* (Sept. 22, 2010) (“So we are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights. That’s why we now require oil, gas and mining companies that raise capital in the United States to disclose all payments they make to foreign governments.”); letter from State Department (recommending that the Commission “produce a strong [Section 13(q)] rule that improves transparency by ensuring a sufficiently detailed level of information concerning payments from the extractive industry to foreign governments for the development of oil, natural gas, and mineral” that would be “made public and accessible to civil society”); id. (“A strong [Section 13(q)] rule would complement [the U.S. Government’s anti-corruption] efforts, bolster our credibility with foreign partners on these issues, and promote U.S. foreign policy interests. It is important the United States lead by example by modeling strong transparency legislation and rulemaking.”); Clinton Transparency Speech (stating that Section 13(q) should “have a very profound effect on [the U.S. Government’s] ability to try to manage some of the worst practices that we see in the extractive industry and in the relationships with governments at local and national levels around the world”).

<sup>77</sup> See Section II.E below. Our definition is generally comparable to the “project” definition that the European Union has adopted and that Canada is considering adopting. We note that the State Department has advised that a Commission rule “compatible with” the EU and Canadian “transparency measures would further advance the United States’ foreign policy interests.” Letter from State Department. Some commenters have argued for a much broader definition of project that would encompass vast expanses of territory in many instances, but as we explain immediately below and in Section II.E, the more granular definition contained in the proposed rules would provide greater payment transparency and better serve the statutory objectives. See generally letter from Iraqi Transparency Alliance for Extractive Industries (Sept. 28, 2015) (“Iraqi Transparency Alliance”) (explaining that “EITI data in Iraq is reported by field, but some fields are enormous,” such as the “Rumaila field—a super-giant oil field, covering around 700 [square miles], with around 270 production wells in

potentially beneficial and that our proposal to require such disclosure is properly designed to further the goal of combatting corruption.

Scholars and other experts have noted that “[t]he extractive sector presents particularly strong asymmetries of information across the principal stakeholders: citizens, governments, and companies.”<sup>78</sup> While resource extraction companies are aware of the payments that they make and government actors may be aware of the revenues that they receive, too often “[t]he citizens of resource-rich countries have very little information about the extractive industry-related activities in which their government engages.”<sup>79</sup> This has been described as “a formula for corruption.”<sup>80</sup>

The public disclosure of resource extraction payments that are made to foreign governments can become an important step towards combatting the information asymmetries

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operation, producing around 1.3 m barrels per day,” and stating that “[w]ithout project-level information, [Iraqi citizens] cannot see the detailed roles that individual companies are playing in the region and whether Iraqi citizens are seeing the appropriate benefits from the extraction”).

<sup>78</sup> Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT’L AFF. 25 (2011). See also 156 CONG. REC. S3817 (May 17, 2010) (Statement of Senator Dodd) (explaining that in many resource-rich countries “governance and accountability systems are rudimentary, at best,” and “corruption, secrecy, and a lack of transparency regarding public finance are pervasive”). See generally Gillies & Heuty (“This uneven allocation [of information] reflects the centralization of power and control of the petroleum and mineral sectors that commonly occurs in developing countries.”).

<sup>79</sup> ESCAPING THE RESOURCE CURSE, at xiv. See also Gillies & Heuty (“Media, parliaments, civil society, the population, opposition parties, and other outsiders often have very limited access to information, which constrains their ability to exercise their oversight and accountability functions.”). See also letters from Iraqi Transparency Alliance (“While EITI data is certainly an improvement upon what we had before . . . there are some serious shortcomings [in that disclosure] that prevent civil society organizations . . . from properly monitoring the flow of money in our oil sector.”); Publish What You Pay - Zimbabwe (Feb. 20, 2015) (“PWYP-ZIM”) (“Currently there is very little useful data published by government or industry in Zimbabwe’s extractives sector.”); Global Witness (Dec. 18, 2013) (“Global Witness 2”) (referring to insufficient disclosure by governments and industry participants resulting in corruption among other things).

<sup>80</sup> ESCAPING THE RESOURCE CURSE, at 266. See generally Dilan Olcer, OECD Working Paper No. 276, *Extracting the Maximum from EITI* (Mar. 11, 2009) (describing the problem in terms of principal-agent theory where the country’s citizens are the principal and the government officials are the agents: “the agent does not faithfully serve the interests of the principal because they have conflicting interests and *the actions of the agent are not observable by the principal*”) (emphasis added).

that can foster corruption and a lack of governmental accountability.<sup>81</sup> This is in part because “[i]mproved transparency in the transactions between governments and extractive corporations means that there should be less room for hidden or opaque behavior[.]”<sup>82</sup> As one academic article describes it:

Information asymmetries facilitate rent-seeking behavior and permit those in charge to utilize the country’s resource wealth to advance their personal and political aims. In such a context, where informational asymmetries are key characteristics of power differentials, transparency is both difficult and a potential agent of change . . . Demystifying the extractive sector and financial flows dilutes some of the center’s power by enabling other actors to participate more fully. It eliminates informational enclaves where incentives favor self-interested behavior.<sup>83</sup>

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<sup>81</sup> See, e.g., letter from State Department (explaining that a “sufficiently detailed level of information concerning payments from the extractive industry to foreign governments for the development of oil, natural gas, and minerals” that is made publicly available is necessary to achieve the anti-corruption and transparency objectives and further explaining that “[i]n the absence of this level of transparency, citizens have fewer means to hold their governments accountable, and accountability is a key component of reducing the risk of corruption”); World Bank, *Striking a Better Balance—the World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review* (Sept. 17, 2004) (describing revenue transparency as “an important step”). We note that the potential for communities and civil society to reduce corruption and achieve greater governmental accountability exists even where the governments at issue have authoritarian tendencies. See also letter from ONE Campaign (Nov. 6, 2015) (“ONE Campaign”) (detailing various case studies involving successful citizen actions taken in countries such as Angola, Azerbaijan and Zimbabwe to “demonstrate[e] that even in countries with closed political systems and restricted civil liberties citizens are still able to use information to drive change”).

<sup>82</sup> Dilan Olcer, OECD Working Paper No. 276, *Extracting the Maximum from EITI* (Mar. 11, 2009). See also 156 CONG. REC. S5872 (July 15, 2010) (Statement of Senator Cardin) (“By giving the citizens the information about how payments are made to their country, they have a much better chance to hold their government officials accountable.”); ESCAPING THE RESOURCE CURSE, at xiv (“The obvious remedy is greater transparency and accountability.”). See generally Global Witness, *Oil Revenue Transparency: A Strategic Component of U.S. Energy Security and Anti-Corruption Policy* (Mar. 2007) (“[E]nergy revenue transparency limits the scope of oil-related corruption through fiscal accountability.”); Caitlin C. Corrigan, *Breaking the Resource Curse: Transparency in the Natural Resources Sector and the Extractive Industries Transparency Initiative*, RESOURCES POLICY (2014) (“Transparency and accountability within government is expected to mitigate some of the negative economic and quality of governance effects seen in countries with poor institutions and abundant resources by making it harder for government to divert revenues to corruption and patronage.”).

<sup>83</sup> Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT’L AFF. 25 (2011). See also *id.* (“Transparency should alter incentives as perceived by the individual in charge by increasing the costs associated with ‘bad’ policies or behavior, such as signing an unfavorable contract in exchange for a bribe or failing to properly assess royalties. It should also alter incentives by increasing external pressure for decision makers to advance the broader national interest as information empowers broader constituencies.”); Ivar Kolstad & Arne Wiig, *Is Transparency the Key to Reducing Corruption in Resource Rich Countries?* World Development (Feb. 2009)

While public disclosure of information about resource extraction payments to foreign governments should help reduce the information asymmetries that allow corruption to occur, the question remains of what form that disclosure should take to best reduce corruption consistent with the statutory objectives. Having considered the public comments received, information the staff learned from inter-agency consultations, relevant academic literature, and other expert analyses (as well as the mandatory disclosure regimes that have recently been adopted by the European Union and Canada), we are proposing to require company-specific, project-level, public disclosure of payment information as the means best designed to advance the U.S. Government's interests in reducing corruption and promoting accountability and good governance.

An important consideration in support of detailed project-level disclosure of the type proposed is that such disaggregated information may help local communities and subnational governments combat corruption by enabling them to verify that they are receiving the resource extraction revenue allocations from their national government that they may be entitled to under law.<sup>84</sup> Several commenters made this point. For example, a civil society group in Cameroon explained:

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("Transparency, or access to information, can have an effect on corruption. Transparency can reduce bureaucratic corruption by making corrupt acts more risky . . . . Transparency can reduce political corruption by helping make politicians more accountable to the public."); Liz David-Barrett & Ken Okamura, *The Transparency Paradox: Why Do Corrupt Countries Join EITI?*, Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) ("A lack of transparency makes corruption less risky and more attractive."). See generally ESCAPING THE RESOURCE CURSE, at 26 ("With the cost-benefit calculus for corruption changed, there might be less corruption.").

<sup>84</sup> See, e.g., letter from National Advocacy Coalition on Extractives (Feb. 10, 2015) ("NACE") ("In order to calculate the amount of money they are entitled to and hold [national] government agencies to account for allocating the correct amount, communities need access to project-level revenue data.").

The Cameroonian Mining Code states that municipality and local communities are entitled to 25 percent of the Ad Valorem tax and Extraction tax paid by companies for the projects located in their jurisdiction . . . . [W]ithout project-level fiscal data, local populations will not be able to cross-check whether or not they are receiving the share of revenues they are legally entitled to.<sup>85</sup>

A civil society group in Angola similarly represented that project-level data would help “ensur[e] [that] local communities receive their entitlements from revenue sharing agreements[.]”<sup>86</sup>

Project-level disclosure could help reduce instances where government officials are corruptly depriving subnational governments and local communities of revenue allocations to which they are entitled.<sup>87</sup>

Company-specific, project-level, public data also may permit citizens, civil society groups, and others to actively engage in the monitoring of revenue flows in various other ways

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<sup>85</sup> Letter from Publish What You Pay Cameroon (June 8, 2015)(“PWYP-CAM”). See also *id.* (“Unfortunately, insufficient granularity is a serious flaw in Cameroon’s EITI reports, as companies report the total amount of money they are pay[ing] for all projects in our country, *combined.*”) (emphasis in original).

<sup>86</sup> Letter from Open Society Institute for Southern Africa-Angola (Jan. 29, 2015) (“OSISA-A”). See also *id.* (“[T]he Angolan government is required by law to transfer 10 per cent of the taxes generated by extraction projects in Cabinda directly to the provincial government. The revenue is earmarked for spending on local development initiatives in order to help offset some of the social and environmental costs of oil production for local communities. Similar oil revenue-sharing agreements exist in the Angolan provinces of Zaire and Bengo.”); letter from ONE Campaign (stating that in Burkina Faso mining companies are required to pay 1.0% of their revenues to local communities in which they operate in order to help communities finance improvements in healthcare, education, sanitation, and clean water and explaining that “[a]ccess to project-level payment information will be crucial for helping citizens to monitor that mining companies are paying 1% of revenues to local communities and to hold the government accountable for those funds”).

<sup>87</sup> For example, a civil society group in Indonesia reports that it is already using Indonesia’s EITI reports—which apparently now include project-level reporting—to “[e]nsur[e] that local governments and communities are properly compensated for the oil, gas, and mining activity in their” geographical areas. See Letter from Publish What You Pay - Indonesia (Mar. 11, 2015)(“PWYP-IND”) (“By law, local governments [in Indonesia] are to receive 15 percent of oil revenue generated by local projects, 30 percent of gas revenue, and 80 percent of mineral royalties . . . .[D]istrict governments and citizens inhabiting resource-rich areas can now calculate the share of extractives revenue they are owed, and confirm that it is delivered.”). We note that in an analogous area such public disclosure has reduced corruption. See R. Reinikka & J. Svenson, *Fighting Corruption to Improve Schooling: Evidence from a Newspaper Campaign in Uganda*, JOURNAL OF EUROPEAN ECONOMIC ASSOCIATION (2005) (reporting that, following surveys in Uganda showing that only 13% of education grants actually reached schools in the 1990s (the rest being captured by local governments), the Ugandan government started to publish monthly grants to districts in newspapers; the study found that publication of the grants had a substantial effect on preventing the corrupt diversion of the funds such that, by 2001, more than 80% of grants on average reached schools).

that may reduce corruption and increase accountability.<sup>88</sup> For example, project-level reporting would potentially allow for comparisons of revenue flows among different projects.<sup>89</sup> The potential to engage in cross-project revenue comparisons may allow citizens, civil society groups, and others to identify potential payment discrepancies that reflect corruption or other inappropriate financial discounts.<sup>90</sup>

Furthermore, to the extent that a company's specific contractual or legal obligations to make resource extraction payments to a foreign government are known (or are discoverable), company-specific, project-level disclosure may help assist citizens, civil society groups, and others "to monitor individual company's contributions to the public finances and ensure firms are meeting their payment obligations."<sup>91</sup> Such data may also help various actors ensure that the

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<sup>88</sup> See generally Liz David-Barrett & Ken Okamura, *The Transparency Paradox: Why Do Corrupt Countries Join EITI?*, Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) ("[P]roviding highly aggregated macroeconomic figures on oil revenues or expenditures is likely to result in collective action problems, where individual incentives to act on the information are weak."); Bank Information Center & Global Witness, *Assessment of IMF and World Bank Group Extractive Industries Transparency Implementation* (Oct. 2008) ("Local groups working on [extractive industry] transparency issues insist that project-level disclosure is necessary to carrying out meaningful tracking of revenue flows from extractive industries, especially important to local communities."); letters from Iraqi Transparency Alliance ("[C]itizens most impacted by extraction—such as communities located near extraction sites—will require project-level data in order to determine whether they are receiving a fair share of services from their provincial governments. For example, a villager located near an extraction site might draw on project level data to discover that her provincial government is generating huge sums of money from a nearby project, yet providing relatively paltry services to the affected village. In such a case, project level payment information could be used to effectively lobby the provincial government for additional expenditures."); and Transparency International-USA (Dec. 8, 2015) (stating that project-level disclosure "will allow anti-corruption groups to identify corruption and hold governments and companies to account").

<sup>89</sup> See, e.g., letters from PWYP-ZIM ("Project-level reporting would also allow for some comparison along projects at similar levels of maturation."); CSCU ("[I]f revenue data is not disaggregated by company, it will not aid our understanding of the deals negotiated, and variations in payments made, by different companies.").

<sup>90</sup> See generally letter from CSCU ("Only payment data that is company-specific would enable us to call on both companies and the Government to explain any substantial variations among different companies, and ensure that individual firms are not improperly obtaining fiscal benefits.").

<sup>91</sup> Letter from CSCU. See also letter from ONE Campaign (describing how EITI disclosures in Liberia enabled civil society groups to discover that a mining company had fraudulently failed to pay over \$100,000 to the government and to compel the company to make the required payment).

government “is properly collecting and accounting for payments.”<sup>92</sup> Relatedly, an important additional benefit of company-specific and project-level transparency “is that it would also act as a strong deterrent to companies underpaying royalties” or other monies owed.<sup>93</sup>

Additionally, we note that various commenters have asserted that “[p]roject-level reporting in particular will help communities and civil society [groups] to weigh the costs and benefits of an individual project.”<sup>94</sup> Where the net benefits of a project are small or non-existent, this may be an indication that the foreign government’s decision to authorize the project is based on corruption or other inappropriate motivations.<sup>95</sup>

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<sup>92</sup> Id. See also id. (“[CSCU] is planning to use project- and company-level data . . . in conjunction with a new contract modeling tool developed by the U.K. NGO Global Witness, which allows citizens to use publicly available contracts to predict how much revenue a government will receive from that contract. We will check project-level payment data disclosed by companies against the model’s predictions to analyze and raise questions about any discrepancies between reported payments from modeled predictions.”). See generally Dilan Olcer, OECD Working Paper No. 276, *Extracting the Maximum from EITI* (Mar. 11, 2009) (discussing the earlier version of the EITI which did not require project-level disclosure and explaining that “disaggregated data” is needed to “ensure the level of transparency that is necessary to enable scrutiny by outsiders”).

<sup>93</sup> Letter from CSCU.

<sup>94</sup> Letter from PWYP-ZIM (“If, however, payments cannot be linked to a company or project, it will be impossible to carry out a full assessment of their impact.”). See also letters from Robert F. Conrad, PhD (July 17, 2015) (“[P]roject level reporting is necessary for resource owners, whom I define as the citizens of most natural resource projecting countries, in order to evaluate the net benefits of resource development, both in total and at the margin.”); NACE (“Project level payment data is also necessary to enable communities to conduct an informed cost-benefit analysis of the projects in their backyard . . . . For local communities affected by extractive projects, knowledge of the total, combined amount a company has paid the government for all extractive projects is of little value; what matters most to a community is the revenue generated from the specific projects in its backyard.”). See generally letter from CSCU (explaining that the civil society group is planning to “translate the oil revenues into the potential tangible infrastructure and development projects that the revenues could fund to improve lives of citizens throughout the country and especially in areas where [the projects] are located . . . . By pairing the exact number of schools, health centers, roads, and power plants made possible by oil revenues from specific companies and projects with actual local need, [CSCU] aim[s] to educate citizens about the potential benefits of oil revenues, encourage them to become more engaged . . . and demand realization of these benefits on the ground.”).

<sup>95</sup> Letter from PWYP-ZIM (explaining that without company-specific, project-level, public disclosure, “we would not know the monetary amounts received by the government when it sells individual licenses, which is fundamental to determining corruption and incentivizing public officials to secure a fair return on the sale of natural resources”). Cf. generally ESCAPING THE RESOURCE CURSE, at 14 (“Corporations in the extractive industries also have an incentive to limit transparency, to make it more difficult for citizens to see how much their government is getting in exchange for sale of the country’s resources.”).

Finally, in proposing company-specific, project-level, public disclosure of resource extraction payments to foreign governments, we are mindful that this new transparency alone would likely not eliminate corruption in connection with resource extraction payments to foreign governments.<sup>96</sup> The “ultimate impact [of the disclosures] will largely depend on the ability of all stakeholders—particularly civil society, media, parliamentarians, and governments—to use [the] available information to improve the management of their resource extractive sector.”<sup>97</sup>

Nevertheless, the payment transparency that our proposed rules would promote could constitute an important and necessary step to help combat corruption in the resource extraction area.<sup>98</sup>

Lastly, it appears to us that the U.S. Government may have few other means beyond the disclosure mechanism required by Section 13(q) to directly target governmental corruption associated with the extractive sector in foreign countries.<sup>99</sup> This reality informs our view that the public disclosure mechanism that we are proposing is a sensible, carefully tailored policy prescription.<sup>100</sup>

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<sup>96</sup> See, e.g., ESCAPING THE RESOURCE CURSE, at 333 (“[T]ransparency may well be a necessary condition for better management of oil and gas wealth, but it is unlikely to be a sufficient condition.”); Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT’L AFF. 25 (2011) (“The availability and access to information can only address asymmetries if the stakeholders have the capacity and access needed to use the information and respond when decision makers fail to represent their interests.”).

<sup>97</sup> Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT’L AFF. 25 (2011). See generally Dilan Olcer, OECD Working Paper No. 276, *Extracting the Maximum from EITI* (Mar. 11, 2009) (stating that “transparency is only part of accountability, and may be of limited value if the other dimensions are neglected”).

<sup>98</sup> See generally ESCAPING THE RESOURCE CURSE, at 278 (explaining that “[g]reater access to information sets the framework for producing better monitoring”).

<sup>99</sup> See generally Senate Report, 17-21 (discussing potential policy tools available to the U.S. Government).

<sup>100</sup> We note that much of the commentary on improved transparency in connection with resource extraction payments to governments in resource-rich developing countries focuses on the potential to produce improved socio-economic conditions in those countries. In the context of the disclosures required by Section 13(q), however, we believe that the primary governmental interest is the more modest objective of reducing corruption and potentially enhancing governmental accountability; the potential to improve socio-economic conditions is,

## II. PROPOSED RULES UNDER SECTION 13(q)

### A. Definition of “Resource Extraction Issuer”

Section 13(q) defines a resource extraction issuer in part as an issuer that is “required to file an annual report with the Commission.” We believe this language could reasonably be read either to cover or to exclude issuers that file annual reports on forms other than Forms 10-K, 20-F, or 40-F. We are proposing, however, to cover only issuers filing annual reports on forms 10-K, 20-F, or 40-F. Specifically, the proposed rules would define the term “resource extraction issuer” to mean an issuer that is required to file an annual report with the Commission pursuant to Section 13 or 15(d) of the Exchange Act and that engages in the commercial development of oil, natural gas, or minerals.<sup>101</sup> The proposed definition would therefore exclude, for example, issuers subject to Tier 2 reporting obligations under Regulation A. In addition, consistent with the 2012 Rules, investment companies registered under the Investment Company Act of 1940 (“Investment Company Act”) would not be subject to the proposed rules.<sup>102</sup>

We believe that covering other issuers would do little to further the transparency objectives of Section 13(q) but would add costs and burdens to the existing disclosure regimes

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in our view, a secondary objective. Compare generally Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT’L AFF. 25 (2011) (noting “[m]ethodological challenges” in demonstrating a “causal chain between the disclosure of information and improved development outcomes”); with Andres Mejia Acosta, *The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources*, DEVELOPMENT POLICY REVIEW (2013) (“Existing evidence of effective impact is also likely to increase as countries are exposed for longer periods to [transparency and accountability initiatives].”).

<sup>101</sup> See proposed Rule 13q-1(c) and proposed Item 2.01(c)(11) of Form SD. We interpret “engages” as used in Section 13(q) and proposed Rule 13q-1 to include indirectly engaging in the specified commercial development activities through an entity under a company’s control. See Section II.E below for our discussion of “control.”

<sup>102</sup> See 2012 Adopting Release, n.390 (clarifying the Commission’s intent to exclude companies required to file annual reports on forms other than Forms 10-K, 20-F or 40-F). The intended exclusion was not explicit in the definition of “resource extraction issuer” in the 2012 Rules. See also General Instruction C to Form SD (providing that the disclosures required in Form SD shall not apply to investment companies required to file reports pursuant to Investment Company Act Rule 30d-1).

governing those categories of issuers. In this regard, we note that none of the Regulation A issuers with qualified offering statements between 2009 and 2014 appear to have been resource extraction issuers at the time of those filings.<sup>103</sup> It also seems unlikely that an entity that fits within the definition of an “investment company”<sup>104</sup> would be one that is “engag[ing] in the commercial development of oil, natural gas, or minerals.”

As noted above, the proposed definition of the term “resource extraction issuer” would apply only to issuers that are required to file an annual report with the Commission pursuant to Section 13 or 15(d) of the Exchange Act. As with the 2012 Rules, we are not proposing exemptions to the definition of resource extraction issuer based on size, ownership, foreign private issuer status,<sup>105</sup> or the extent of business operations constituting commercial development of oil, natural gas, or minerals. Some commenters on the 2012 Rules urged us to provide exemptions for certain categories of issuers that file annual reports pursuant to Section 13 or 15(d) of the Exchange.<sup>106</sup> Other commenters supported the approach we are proposing.<sup>107</sup> These commenters noted that the legislative intent underlying Section 1504 was to provide the broadest

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<sup>103</sup> Based on a review of their assigned Standard Industrial Classification (SIC) codes. Nevertheless, we recognize that Tier 2 of Regulation A, with a maximum offering amount of \$50 million, is a new disclosure regime and that the types of companies previously or currently using Regulation A may not be representative of its future use. In addition, since Regulation A issuers were not required to file annual reports when Section 13(q) was enacted, it seems unlikely that Congress contemplated Regulation A issuers having to comply with Section 13(q). Given the added costs and burdens discussed above, we do believe it is prudent to extend the rule in this manner.

<sup>104</sup> See Section 3(a)(1) of the Investment Company Act (15 U.S.C. 80a-3(a)(1)).

<sup>105</sup> We believe that not including government-owned companies within the scope of the disclosure rules could raise competitiveness concerns. See also 2012 Adopting Release at Section II.B.

<sup>106</sup> See 2012 Adopting Release at Section II.B.2 for a discussion of these comment letters and related analysis.

<sup>107</sup> See *id.*

possible coverage of extractive companies so as to create a level playing field.<sup>108</sup> We agree that broader coverage would appear to serve better the transparency objectives of Section 13(q) by requiring disclosure from all the resource extraction issuers that are subject to our existing Exchange Act reporting framework. Moreover, as some commenters noted, additional categorical exemptions could contribute to an unlevel playing field and raise competitiveness concerns for companies that would be subject to the rules.<sup>109</sup>

In contrast to the call to provide exemptions, some commenters on the 2010 Proposing Release requested that the Commission extend the disclosure requirements to foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to Exchange Act Rule 12g3-2(b).<sup>110</sup> Those commenters asserted that requiring such issuers to comply with the disclosure requirements would help ameliorate anti-competitive concerns. As noted by commenters who opposed this suggestion, extending the disclosure required under Section 13(q) to companies that are exempt from Exchange Act registration and reporting would discourage reliance on Rule 12g3-2(b)<sup>111</sup> and would be inconsistent with the effect, and we believe the purpose, of that rule.<sup>112</sup> In this regard, we note that Rule 12g3-2(b) provides relief to

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<sup>108</sup> See, e.g., letters from Calvert Investments (Mar. 1, 2011) (“Calvert 1”); Global Witness (Feb. 25, 2011) (“Global Witness 1”); Oxfam America (Feb. 21, 2011) (“Oxfam 1”); Publish What You Pay U.S. (Feb. 25, 2011) (“PWYP 1”); Senator Benjamin Cardin, Senator John Kerry, Senator Patrick Leahy, Senator Charles Schumer, and Representative Barney Frank (March 1, 2011) (“Sen. Cardin et al. 1”); Senator Carl Levin (Feb. 1, 2011) (“Sen. Levin 1”); and World Resources Institute (Mar. 1, 2011) (“WRI”).

<sup>109</sup> See 2012 Adopting Release, nn. 33-34 and accompanying text.

<sup>110</sup> See letters from American Petroleum Institute (Jan. 28, 2011) (“API 1”); Calvert 1; Exxon Mobil (Jan. 31, 2011) (“ExxonMobil 1”); Global Witness 1; Revenue Watch Institute (Feb. 17, 2011) (“RWI 1”); and Royal Dutch Shell plc (Jan. 28, 2011) (“RDS 2”).

<sup>111</sup> See letter from New York State Bar Association, Securities Regulation Committee (Mar. 1, 2011) (“NYSBA Committee”).

<sup>112</sup> See letter from National Mining Association (Mar. 2, 2011) (“NMA 2”) and NYSBA Committee.

foreign private issuers that are not currently Exchange Act reporting companies (i.e., they are neither listed nor have made a registered offering in the United States) and whose primary trading market is located outside the United States. In these circumstances, we do not believe it would be appropriate to require foreign private issuers whose connections with the U.S. markets do not otherwise require them to make reports with the Commission to undertake such an obligation solely for the purpose of providing the required payment information. Moreover, imposing a reporting obligation on such issuers would seem to go beyond what is contemplated by Section 13(q), which defines a “resource extraction issuer” as an issuer that is “required to file an annual report with the Commission.”<sup>113</sup> While we acknowledge that not requiring these issuers to disclose the required payment information could potentially limit the transparency objectives of the statute, and potentially give rise to anti-competitive concerns as some commenters suggested, we believe these effects are mitigated by the fact that some foreign private issuers that are exempt from registration and reporting under Rule 12g3-2(b) may be listed in foreign jurisdictions, such as the European Union or Canada, that have recently implemented their own revenue transparency measures, in which case these issuers will be required to disclose similar payment information in their home jurisdictions.

### **Request for Comment**

1. Should we exempt certain categories of issuers from the proposed rules, such as smaller reporting companies, emerging growth companies, or foreign private issuers?<sup>114</sup> If so,

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<sup>113</sup> See 15 U.S.C. 78m(q)(1)(D).

<sup>114</sup> See the definition of “smaller reporting company” in Exchange Act Rule 12b-2 [17 CFR 240.12b-2], the definition of “emerging growth company” in Exchange Act Section 3(a)(80) [15 U.S.C. 78c(a)(80)], and the definition of “foreign private issuer” in Exchange Act Rule 3b-4 [17 CFR 240.3b-4].

which ones and why? If not, why not? Should we exempt companies that are unlikely to make payments above the proposed de minimis threshold of \$100,000?<sup>115</sup> For example, should we provide that a resource extraction issuer with annual revenues and net cash flows from investing activities below the de minimis threshold in a fiscal year would not be subject to the proposed disclosure rules for the subsequent fiscal year? Should we use a threshold that is different from the de minimis threshold or some other measure of an issuer's ability to make such payments to make this determination? Alternatively, should our rules provide for different disclosure and reporting obligations for these or other types of issuers? If so, what should the requirements be?

2. Should we provide for a delayed implementation date for certain categories or types of issuers in order to provide them additional time to prepare for the disclosure requirements and the benefit of observing how other companies comply?
3. Should we, as proposed, limit the definition of "resource extraction issuer" to those issuers that are required to file an annual report with us under Exchange Act Section 13 or 15(d), thus excluding issuers who file annual reports pursuant to other provisions? Why or why not? For example, should we, as proposed, exclude issuers subject to Tier 2 reporting obligations under Regulation A?
4. Would our proposed rules present unique challenges for particular categories of issuers? If so, what is the nature of these challenges and could they be mitigated?
5. Should we define "resource extraction issuer" to include investment companies registered under the Investment Company Act? Why or why not?

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<sup>115</sup> See Sections II.C.2 and III.B.2.b below.

## **B. Definition of “Commercial Development of Oil, Natural Gas, or Minerals”**

As noted above, Section 13(q) defines “commercial development of oil, natural gas, or minerals.”<sup>116</sup> Consistent with the statute and the 2012 Rules we propose to define “commercial development of oil, natural gas, or minerals” to include exploration, extraction, processing, export and the acquisition of a license for any such activity. This approach should enhance international transparency by covering activities similar to those covered by the EU Directives and Canada’s ESTMA.<sup>117</sup> Prior to the 2012 Rules, we received significant comment on this aspect of the proposal. Some commenters sought a more narrow definition than proposed, while other commenters sought a broader definition.<sup>118</sup> Although we have discretionary authority under Section 13(q) to include other significant activities relating to oil, natural gas, or minerals, we are not proposing to do so. As a general matter, in light of the potentially significant costs associated with the proposed rules, we have not sought to impose disclosure obligations that extend beyond Congress’ required disclosures and the disclosure standards developed in connection with international transparency efforts. In this regard, we note that the definition of

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<sup>116</sup> See Section I above.

<sup>117</sup> The EU Directives cover “exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials.” See, e.g., Article 41(1) of the EU Accounting Directive. ESTMA defines “commercial development of oil, gas or minerals” as “(a) the exploration or extraction of oil, gas or minerals; (b) the acquisition or holding of a permit, licence, lease or any other authorization to carry out any of the activities referred to in paragraph (a); or (c) any other prescribed activities in relation to oil, gas or minerals.”

<sup>118</sup> See 2012 Adopting Release at Section II.C.2. Although we have received several comments since the U.S. District Court for the District of Columbia vacated the rules adopted in 2012, none has addressed the scope of “commercial development.”

“commercial development” in Section 13(q) is broader than the activities typically covered by the EITI<sup>119</sup> and in some respects, other comparable disclosure regimes.<sup>120</sup>

As noted in the 2010 Proposing Release, the proposed definition of “commercial development” is intended to capture only activities that are directly related to the commercial development of oil, natural gas, or minerals.<sup>121</sup> It is not intended to capture activities that are ancillary or preparatory to such commercial development. Accordingly, we would not consider an issuer providing only services that support the exploration, extraction, processing, or export of such resources to be a “resource extraction issuer,” such as an issuer that manufactures drill bits or provides hardware to help companies explore and extract.<sup>122</sup> Similarly, an issuer engaged by an operator to provide hydraulic fracturing or drilling services, thus enabling the operator to extract resources, would not be considered a resource extraction issuer. We note, however, that where a service provider makes a payment to a government on behalf of a resource extraction issuer that meets the definition of “payment,” under the proposed rules, the resource extraction issuer would be required to disclose such payments. We believe this approach is consistent with Section 13(q) and the approach of the EU Directives and the EITI that only companies directly

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<sup>119</sup> An EITI plan typically covers the “upstream activities” of exploration and production but not “downstream activities,” such as processing or export. The relevant multi-stakeholder group does, however, have the option of expanding the scope of its EITI program by including some downstream activities. See the EITI Handbook, at 35.

<sup>120</sup> For example, processing, export, and the acquisition of licenses are not specifically mentioned by the EU Directives.

<sup>121</sup> See 2010 Proposing Release at Section II.C.

<sup>122</sup> Marketing activities would also not be included. Section 13(q) does not include marketing in the list of activities covered by the definition of “commercial development.” In addition, including marketing activities within the final rules under Section 13(q) would go beyond what is covered by the EITI and other international regimes. See, e.g., the EITI Handbook, at 35. For similar reasons, the definition of “commercial development” does not include activities relating to security support. See 2012 Adopting Release at Section II.D for a related discussion of payments for security support.

engaged in the extraction or production of oil, natural gas, or minerals must disclose payments made to governments.<sup>123</sup>

In response to commenters' prior requests for clarification of the activities covered by the proposed definition of "commercial development," we are identifying the activities that would be covered by the terms "extraction" and "export" and providing examples of the activities that would be covered by the term "processing." We note, however, that whether an issuer is a resource extraction issuer would depend on the specific facts and circumstances. "Extraction" would mean the production of oil and natural gas as well as the extraction of minerals.<sup>124</sup> "Processing" would include, but is not limited to, midstream activities such as the processing of gas to remove liquid hydrocarbons, the removal of impurities from natural gas prior to its transport through a pipeline, and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. It would also include the crushing and processing of raw ore prior to the smelting phase.<sup>125</sup>

We do not believe that "processing" should include the downstream activities of refining or smelting. The objective of the disclosure required by Section 13(q) is to make more transparent the payments that resource extraction issuers make to governments, which are

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<sup>123</sup> It does not appear that such activities are covered by the EU Directives' provisions on resource extraction payment disclosure. For example, Article 41 of the EU Accounting Directive only refers to the economic activities listed in "Section B, Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006" when defining the types of companies subject to the disclosure rules. Activities such as "mining support service activities" and "support activities for petroleum and natural gas extraction," however, are not included in those Divisions but are explicitly included in Division 09.

<sup>124</sup> Proposed Item 2.01(c)(5) of Form SD.

<sup>125</sup> See proposed Instruction 7 to Item 2.01 of Form SD.

primarily generated by “upstream” activities like exploration and extraction. Issuers do not typically make payments to the host government in connection with refining or smelting. We also note that in other contexts Congress has treated midstream activities like “processing” and downstream activities like “refining” as separate activities, which further supports our view that Congress did not intend to include “refining” and “smelting” as “processing” activities.<sup>126</sup> Finally, we note that including refining or smelting within the rules under Section 13(q) would go beyond what is currently contemplated by the EITI, which does not typically include the downstream activities of refining and smelting.<sup>127</sup> The EU Directives also do not cover refining or smelting in its list of covered activities.<sup>128</sup>

“Export” would mean the transportation of a resource from its country of origin to another country by an issuer with an ownership interest in the resource.<sup>129</sup> This definition of the term “export” reflects the significance of the relationship between upstream activities such as exploration and extraction and the categories of payments to governments identified in the statute. In contrast, we do not believe that Section 13(q) was intended to capture payments

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<sup>126</sup> The Sudan Accountability and Divestment Act of 2007 (“SADA”), which also relates to resource extraction activities, specifically includes “processing” and “refining” as two distinct activities in its list of “mineral extraction activities” and “oil-related activities . . .” See 110 P.L. No. 174 (2007). Similarly, the Commission’s oil and gas disclosure rules exclude refining and processing from the definition of “oil and gas producing activities” (other than field processing of gas to extract liquid hydrocarbons by the company and the upgrading of natural resources extracted by the company other than oil or gas into synthetic oil or gas). See Rule 4-10(a)(16)(ii) of Regulation S-X [17 CFR 210.4-10(a)(16)(ii)] and 2012 Adopting Release, n.108.

<sup>127</sup> See, e.g., the EITI Handbook, at 35.

<sup>128</sup> See, e.g., Article 41(1) of the EU Accounting Directive (including “exploration, prospection, discovery, development, and extraction” in the definition of an “undertaking active in the extractive industry,” but not including refining or smelting).

<sup>129</sup> See proposed Item 2.01(c)(4) of Form SD. Several commenters have argued that “export” means the removal of the resource from the place of extraction to the refinery, smelter, or first marketable location. See 2012 Adopting Release, nn.111, 112, 134 and accompanying text. We believe that our interpretation of “export” better captures the intended meaning of that term. In this regard, we are not aware of anything in Section 13(q) or the legislative history that suggests Congress meant “export” to have a meaning that does not require the resource to be transported across an international boundary.

related to transportation on a fee-for-service basis across an international border by a service provider with no ownership interest in the resource.<sup>130</sup>

In an effort to emphasize substance over form or characterization and to reduce the risk of evasion, we are also proposing an anti-evasion provision.<sup>131</sup> The proposed rules would require disclosure with respect to an activity (or payment) that, although not within the categories included in the proposed rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).<sup>132</sup> For example, under this provision a resource extraction issuer could not avoid disclosure by re-characterizing an activity as transportation that would otherwise be covered under the rules.<sup>133</sup>

### **Request for Comment**

6. Should we, as proposed, define “commercial development of oil, natural gas, or minerals” as the term is described in the statute? Should it be defined more broadly or more narrowly? If more broadly, should the definition of “commercial development of oil, natural gas, or minerals” include any additional activities not expressly identified in the statute? If so, what activities should be covered? Would including additional activities impose any significant additional costs on issuers? Does our proposed definition further the U.S. Government’s foreign policy objective of battling corruption

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<sup>130</sup> It is noteworthy that Section 13(q) includes export, but not transportation, in the list of covered activities. In contrast, SADA specifically includes “transporting” in the definition of “oil and gas activities” and “mineral extraction activities.” The inclusion of “transporting” in SADA, in contrast to the language of Section 13(q), suggests that the term export means something different than transportation.

<sup>131</sup> See Section II.C.1 below for more detail on the anti-evasion provision.

<sup>132</sup> See proposed Rule 13q-1(b).

<sup>133</sup> Similarly, if a resource extraction issuer were to make a payment to a third party in order to avoid disclosure under the proposed rules, whether at the direction of a foreign government or otherwise, the proposed rules would require the disclosure of such payment.

and, in so doing, potentially improve governance and accountability in resource-rich countries? If not, what would?

7. Should any of the activities listed in the statute be excluded from the definition of “commercial development of oil, natural gas, or minerals?” If any activities should be excluded, which activities and why?
8. Should activities that are ancillary or preparatory, such as services associated with or in support of activities included in Section 13(q), be expressly included in activities covered by the rules, resulting in the companies performing such services being considered “resource extraction issuers?” Why or why not? Should we provide any additional guidance regarding the types of activities that may be “directly related” to the “commercial development of oil, natural gas, or minerals,” as opposed to activities that are ancillary or preparatory? For example, are other types of services so critical to the commercial development of oil, natural gas, or minerals that they should be covered expressly by the rules? Why or why not?
9. Should we provide additional guidance on which activities would be covered by the terms “extraction,” “processing,” and “export?” If so, what guidance would be helpful?
10. As noted above, “extraction” would mean the production of oil and natural gas as well as the extraction of minerals. Are the activities covered too narrow or too broad?
11. As noted above, “processing” would include midstream activities such as (a) the processing of gas to remove liquid hydrocarbons, (b) the removal of impurities from natural gas prior to its transport through a pipeline, (c) the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or

synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal, and (d) the crushing and processing of raw ore prior to the smelting phase. Are these examples of “processing” too narrow or too broad? Why or why not?

12. As discussed above, the definition of “commercial development of oil, natural gas, or minerals” would not cover transportation made for a purpose other than export and “export” would mean transportation from the resource’s country of origin to another by a person with an ownership interest in the resource. Are the activities covered too narrow or too broad? Why or why not? For example, should the definition be broadened to include “transportation” more generally? Should “export” include all transportation from one country to another, regardless of ownership interest or whether the resource originated in the country from which it is being transported?

### **C. Definition of “Payment”**

Section 13(q) defines “payment” to mean a payment that:

- is made to further the commercial development of oil, natural gas, or minerals;
- is not de minimis; and
- includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the EITI’s guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

## 1. Types of Payments

Consistent with the 2012 Rules, the proposed rules define payments to include the specific types of payments identified in the statute. In addition to the statutory mandate to include these types of payments, we note that these payments are identified in the EITI's guidelines,<sup>134</sup> as well as the EU Directives and other regulations. Thus, including them is also consistent with the Congressional mandate for our rules to support international transparency promotion efforts. In addition to the types of payments expressly included in the definition of payment in the statute, Section 13(q) provides that the Commission include within the definition "other material benefits," subject to the requirement that it determines they are "part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." According to Section 13(q), these "other material benefits" must be consistent with the EITI's guidelines "to the extent practicable."<sup>135</sup>

Some commenters suggested that we include a broad, non-exhaustive list of payment types or category of "other material benefits."<sup>136</sup> That approach, however, would be inconsistent with our view that Section 13(q) directs us to make an affirmative determination that the other "material benefits" are part of the commonly recognized revenue stream. Thus, under the proposed rules, resource extraction issuers would be required to disclose only those payments that fall within the specified list of payment types in the statute, as well as payments of certain dividends and for infrastructure payments (discussed below). We have determined that these payment types represent material benefits that are part of the commonly recognized revenue

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<sup>134</sup> See EITI Standard, at 26.

<sup>135</sup> 15 U.S.C. 78m(q)(1)(C)(ii).

<sup>136</sup> See 2012 Adopting Release, n.175 and accompanying text.

stream and that otherwise meet the definition of “payment.” In support of this determination, we note that the EU Directives and other recent international transparency promotion efforts also require only these payment types to be disclosed.<sup>137</sup>

We agree with certain commenters who stated that it would be appropriate to add some of the types of payments included under the EITI that are not explicitly mentioned under Section 13(q).<sup>138</sup> Accordingly, we propose adding dividends to the list of payment types required to be disclosed. The proposed rules clarify in an instruction that a resource extraction issuer generally would not need to disclose dividends paid to a government as a common or ordinary shareholder of the issuer as long as the dividend is paid to the government under the same terms as other shareholders.<sup>139</sup> The issuer would, however, be required to disclose any dividends paid to a government in lieu of production entitlements or royalties. Under this approach, ordinary dividend payments would not be part of the commonly recognized revenue stream, because they are not made to further the commercial development of oil, natural gas, or minerals.<sup>140</sup>

The proposed list of payment types subject to disclosure would also include payments for infrastructure improvements, such as building a road or railway to further the development of oil, natural gas, or minerals. Several commenters stated that, because resource extraction issuers often make payments for infrastructure improvements either as required by contract or voluntarily, those payments constitute “other material benefits” that are part of the commonly

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<sup>137</sup> See, e.g., Article 41(5) of the EU Accounting Directive and Section 2 of ESTMA.

<sup>138</sup> See, e.g., letter from AngloGold Ashanti (Jan. 31, 2011) (“AngloGold”).

<sup>139</sup> See proposed Instruction 10 to Item 2.01 of Form SD.

<sup>140</sup> See letters from Cleary Gottlieb Steen & Hamilton (Mar. 2, 2011) (“Cleary”) and Statoil.

recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>141</sup>

For example, if an issuer is obligated to build a road rather than paying the host country government to build the road, the issuer would be required to disclose the cost of building the road as a payment to the government.<sup>142</sup> We further note that payments for infrastructure improvements have been required under the EITI since 2011.<sup>143</sup>

In sum, the comments described above and the EITI's inclusion of dividend and infrastructure payments provide substantial support for our determination that that they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. Moreover, including payment types in the proposed rules that are required to be disclosed under the EITI would be consistent with the statute's directive.<sup>144</sup>

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<sup>141</sup> See letters from AngloGold; Barrick Gold Corporation (Feb. 28, 2011) ("Barrick Gold"); EarthRights International (Jan. 26, 2011) ("ERI 1"); Earthworks (Mar. 2, 2011) ("Earthworks"); EG Justice (Mar. 29, 2011) ("EG Justice 1"); Global Witness 1; ONE (Mar. 2, 2011) ("ONE"); and PWYP 1.

<sup>142</sup> For additional discussion of our proposed approach to in-kind payments, see note 156 below and the accompanying text. See also 2012 Adopting Release, n.212 and accompanying text. Some commenters suggested infrastructure payments are usually not material compared to the other types of payments required to be disclosed under Section 13(q) and that infrastructure payments are of a de minimis nature compared to the overall costs of commercial development. See API 1; ExxonMobil 1; RDS 2; and Statoil. To the extent that such payments are de minimis, however, they would be excluded under the proposed definition.

<sup>143</sup> In February 2011, the EITI Board issued revised EITI rules that require participants to develop a process to disclose infrastructure payments under an EITI program. See EITI Rules 2011, available at <http://eiti.org/document/rules>. See also EITI Requirement 9(f) in EITI Rules 2011, at 24 ("Where agreements based on in-kind payments, infrastructure provision or other barter-type arrangements play a significant role in the oil, gas or mining sectors, the multi-stakeholder group is required to agree [to] a mechanism for incorporating benefit streams under these agreements in to its EITI reporting process . . .") and EITI Standard, at 27 ("The multi-stakeholder group and the independent administrator are required to consider whether there are any agreements, or sets of agreements, involving the provision of goods and services, including loans, grants and infrastructure works, in full or partial exchange for oil, gas or mining exploration or production concessions or physical delivery of such commodities. . . Where the multistakeholder group concludes that these agreements are material, the multistakeholder group and the Independent Administrator are required to ensure that the EITI Report addresses these agreements, providing a level of detail and transparency commensurate with the disclosure and reconciliation of other payments and revenues streams.").

<sup>144</sup> 15 U.S.C. 78m(q)(1)(C)(ii).

The proposed rules do not require a resource extraction issuer to disclose social or community payments, such as payments to build a hospital or school, because it remains unclear whether these types of payments are part of the commonly recognized revenue stream. In this regard, we note that other recently enacted international transparency promotion efforts, such as the EU Directives and ESTMA, do not include social or community payments.<sup>145</sup> Although we acknowledge that the EITI's current requirement includes the disclosure of material "social expenditures" in an EITI report when those expenditures are required by law or contract,<sup>146</sup> we note that the disclosure of social payments is outside of the scope of the more recent international efforts in the European Union and Canada.<sup>147</sup> In addition, there was no clear consensus among the commenters on whether the proposed rules should include social or community payments as part of identified payments that are required to be disclosed.<sup>148</sup> In light of that, and taking into account our statutory mandate to support international transparency promotion efforts and our desire to minimize the additional compliance costs to issuers that would result from having to track and disaggregate such payments, we are proposing to follow the approach of the European Union and Canada in not proposing to require the disclosure of social or community payments.

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<sup>145</sup> See, e.g., the EU Directives, the U.K. regulations implementing the EU Directives, and Canada's ESTMA.

<sup>146</sup> See EITI Standard, at 27 ("Where material social expenditures by companies are mandated by law or the contract with the government that governs the extractive investment, the EITI Report must disclose and, where possible, reconcile these transactions.").

<sup>147</sup> See EU Accounting Directive, Article 41(5) and ESTMA, Section 2, both of which list types of payments covered by the disclosure regulations without including social payments. But see ESTMA Guidance, Section 3.4 (outlining that "payments made for corporate social responsibility purposes" may be required to be disclosed if "made in lieu of one of the payment categories that would need to be reported under [ESTMA]").

<sup>148</sup> See, e.g., letters from AngloGold; API 1; Barrick Gold; Earthworks; EG Justice 1; ERI 1; ExxonMobil 1; Global Witness 1; NMA 2; ONE; PetroChina Company Limited (Feb. 28, 2011) ("PetroChina"); PWYP 1, RDS 2, Sen. Levin 1; Statoil; and U.S. Agency for International Development (July 15, 2011) ("USAID").

Consistent with Section 13(q), the proposed rules would require a resource extraction issuer to disclose fees, including license fees, and bonuses paid to further the commercial development of oil, natural gas, or minerals. In response to requests by some commenters,<sup>149</sup> the proposed rules clarify that fees include rental fees, entry fees, and concession fees, and that bonuses include signature, discovery, and production bonuses.<sup>150</sup> As commenters noted,<sup>151</sup> the EITI also specifically mentions these types of fees and bonuses as payments that should be disclosed by EITI participants.<sup>152</sup> This supports our view that these types of fees and bonuses are part of the commonly recognized revenue stream. The fees and bonuses identified are not an exclusive list, and there may be other fees and bonuses a resource extraction issuer would be required to disclose. A resource extraction issuer would need to consider whether payments it makes fall within the payment types that would be covered by the proposed rules.

Consistent with Section 13(q), the proposed rules would require a resource extraction issuer to disclose taxes. In addition, the proposed rules include an instruction to clarify that a resource extraction issuer would be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but would not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes.<sup>153</sup> In response to earlier concerns expressed about the difficulty of allocating certain payments that

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<sup>149</sup> See 2012 Adopting Release, n.160 and accompanying text.

<sup>150</sup> See proposed Instruction 9 to Item 2.01 of Form SD.

<sup>151</sup> See, e.g., letters from API 1 and ExxonMobil 1.

<sup>152</sup> See EITI Standard, at 26.

<sup>153</sup> See proposed Instruction 8 to Item 2.01 of Form SD.

are made for obligations levied at the entity level, such as corporate taxes, to the project level,<sup>154</sup> the proposed rules would provide that issuers may disclose those payments at the entity level rather than the project level.<sup>155</sup>

Many commenters supported the inclusion of in-kind payments, particularly in connection with production entitlements.<sup>156</sup> We also note that the EU Directives and ESTMA require disclosure of in-kind payments.<sup>157</sup> Under the proposed rules, resource extraction issuers must disclose payments of the types identified in the rules that are made in-kind.<sup>158</sup> Since Section 13(q) specifies that the rules require the disclosure of the type and total amount of payments made for each project and to each government, issuers would need to determine the monetary value of in-kind payments.<sup>159</sup> Consistent with suggestions we received on disclosing these types of payments,<sup>160</sup> the proposed rules specify that issuers may report in-kind payments at cost, or if cost is not determinable, fair market value, and provide a brief description of how the monetary value was calculated.<sup>161</sup>

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<sup>154</sup> See 2012 Adopting Release, n.155 and accompanying text.

<sup>155</sup> See proposed Instruction 4 to Item 2.01 of Form SD.

<sup>156</sup> See 2012 Adopting Release, nn.170, 211 and accompanying text. In-kind payments include, for example, making a payment to a government in oil rather than a monetary payment.

<sup>157</sup> Article 41 of the EU Accounting Directive and Section 2 of ESTMA specifically include “in kind” payments in their definitions of “payment.”

<sup>158</sup> This would be consistent with the reporting of production entitlements under the EITI. See EITI Standard, at 27.

<sup>159</sup> In addition, in light of the requirement in Section 13(q) to tag the information to identify the currency in which the payments were made, the proposed rules would instruct issuers providing a monetary value for in-kind payments to tag the information as “in-kind” for purposes of the currency tag.

<sup>160</sup> See 2012 Adopting Release, n.173 and accompanying text.

<sup>161</sup> See proposed Instruction 11 to Item 2.01 of Form SD. See also Section 3(e) of ESTMA (“[T]he value of a payment in kind is the cost to the entity—or, if the cost cannot be determined, the fair market value—of the goods and services that it provided.”). The EU Directives do not specify how in-kind payments should be

Finally, as mentioned above,<sup>162</sup> the proposed rules would also require disclosure of activities or payments that, although not within the categories included in the proposed rules, are part of a plan or scheme to evade the disclosure requirements under Section 13(q).<sup>163</sup> In other words, and as suggested by one commenter,<sup>164</sup> a resource extraction issuer may not conceal the true nature of payments or activities that otherwise would fall within the scope of the final rules, or create a false impression of the manner in which it makes payments, in order to circumvent the disclosure requirements. For example, a resource extraction issuer that typically makes payments related to an activity covered under the definition of commercial development of oil, natural gas, or minerals would not be able to evade the disclosure requirements by changing the way it makes payments or by re-categorizing the same activity.

### **Request for Comment**

13. Should we add other payment types, such as social or community payments, or remove certain payment types from the proposed list of covered payment types? If so, please explain which payment types should or should not be considered part of the commonly recognized revenue stream for resource extraction issuers and why. If we exclude social or community payments from the list of covered payment types, as proposed, should we provide additional guidance concerning how an issuer would distinguish social or community payments from infrastructure payments? Why or why not?

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calculated, but require “supporting notes . . . to explain how their value has been determined.” See, e.g., Section 43(3) of the EU Accounting Directive.

<sup>162</sup> See Section II.B above.

<sup>163</sup> See proposed Rule 13q-1(b).

<sup>164</sup> See letter from Sen. Levin (Feb. 17, 2012) (“Sen. Levin 2”).

14. Should we provide different or additional guidance on how to interpret the proposed list of covered payment types? For example, should we specify additional types of fees or bonuses in Instruction 8 to Form SD or should we clarify what other types of payment mean, such as royalties?
15. Should we prescribe a specific method for determining the fair market value of in-kind payments? If so, please explain how fair market value should be determined for such payments. Should we provide guidance concerning appropriate methods for determining fair market value for in-kind payments?
16. Will the proposed anti-evasion provision promote compliance with the disclosure requirements? Should additional guidance be provided about when the anti-evasion provision would apply?

## **2. The “Not De Minimis” Requirement**

The proposed rules would define a “not de minimis” payment in the same way as the 2012 Rules. A “not de minimis” payment would be one that equals or exceeds \$100,000, or its equivalent in the issuer’s reporting currency, whether made as a single payment or series of related payments.<sup>165</sup> This definition would provide a clear standard for determining which payments a resource extraction issuer must disclose. Furthermore, we note that after the 2012 Rules were adopted, several countries established payment thresholds that approximate the

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<sup>165</sup> See proposed Item 2.01(c)(8)(ii) of Form SD. For example, a resource extraction issuer that paid a \$150,000 signature bonus would be required to disclose that payment. The proposed definition also clarifies that disclosure would be required for related periodic payments (e.g., rental fees) when the aggregate amount of such payments exceeds the payment threshold. This is similar to other instructions in our rules requiring disclosure of a series of payments. See, e.g., Instructions 2 and 3 to Item 404(a) of Regulation S-K (17 CFR 229.404(a)). Therefore, a resource extraction issuer obligated to pay royalties to a government annually and that paid \$10,000 in royalties on a monthly basis to satisfy its obligation would be required to disclose \$120,000 in royalties.

proposed \$100,000 standard.<sup>166</sup> We believe that the establishment of a similar payment threshold by these countries diminishes any potential additional compliance burden and potential competitive harm that otherwise could be caused by disclosure rules that include a payment threshold that varies significantly from the standard used in other jurisdictions.

We considered whether to define the term using a standard based on the materiality of the payment to the issuer, as some commenters recommended.<sup>167</sup> As we previously noted, however, the use of the phrase “not de minimis” in Section 13(q), rather than the use of a materiality standard, which is used elsewhere in the federal securities laws and in the EITI,<sup>168</sup> suggests that “not de minimis” should not be interpreted to equate to a materiality standard. More fundamentally, for purposes of Section 13(q), we do not believe that the relevant point of reference for assessing whether a payment is “not de minimis” is its financial significance for the particular issuer. Rather, because the disclosure is designed to further international transparency initiatives regarding payments to governments for the commercial development of oil, natural gas, or minerals, the more appropriate focal point for determining whether a payment is “not de minimis” is in relation to host countries. We recognize, however, that issuers may have difficulty assessing the significance of particular payments for particular countries or recipient governments. Thus, as discussed above, we are proposing a \$100,000 threshold that is consistent with the developing international consensus for payment reporting thresholds.

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<sup>166</sup> See EU Accounting Directive, Article 43(1) and Recital 46 (using €100,000, or approximately \$107,000 (USD) as of Nov. 10, 2015); UK Reports on Payments to Governments Regulations 2014 (2014 Statutory Instrument No. 3209), Part 1, 5.- (3) (using £86,000, or approximately \$129,860 (USD) as of Nov. 10, 2015); Norwegian Regulations, Section 3 (using 800,000 kr, or approximately \$92,480 (USD) as of Nov. 10, 2015); and ESTMA, Section 9(2) (using \$100,000 (CAD), or approximately \$75,400 (USD) as of Nov. 10, 2015).

<sup>167</sup> See 2012 Adopting Release, n.224 and accompanying text.

<sup>168</sup> See 2012 Adopting Release, n.218 and accompanying text.

Among the suggested approaches for defining “not de minimis,”<sup>169</sup> we believe that a standard based on an absolute dollar amount is the most appropriate because it would be easier to apply than a qualitative standard or a relative quantitative standard based on some fluctuating measure, such as a percentage of expenses or revenues of the issuer<sup>170</sup> or a percentage of the host government’s or issuer’s estimated total production value in the host country for the reporting period. Using an absolute dollar amount threshold for disclosure purposes should help reduce compliance costs and may also promote consistency and comparability.<sup>171</sup> In the 2012 Adopting Release, the Commission considered other specific dollar thresholds,<sup>172</sup> but we believe that those thresholds are not appropriate, particularly in light of international developments.<sup>173</sup>

Although some commenters thought a \$100,000 threshold was too high,<sup>174</sup> we believe this threshold would strike an appropriate balance between concerns about the potential compliance burdens of a lower threshold and the need to fulfill the statutory directive that payments greater than a “de minimis” amount be covered. A “not de minimis” definition based on a materiality standard, or a much higher amount, such as \$1,000,000, could lessen commenters’ concerns about the compliance burden and the potential for competitive harm. Nevertheless, as discussed above, these concerns are mitigated by the use of a threshold

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<sup>169</sup> See 2012 Adopting Release at Section II.D.2.

<sup>170</sup> See 2012 Adopting Release, nn.231-233 and accompanying text.

<sup>171</sup> See 2012 Adopting Release, n.233 and accompanying text.

<sup>172</sup> See 2012 Adopting Release at Section II.D.2.b for a discussion of commenters’ recommendations of a \$15,000 or \$1,000,000 threshold.

<sup>173</sup> See note 166 above and accompanying text.

<sup>174</sup> See, e.g., letters from Catholic Relief Services and Committee on International Justice and Peace (Feb. 9, 2011) (“CRS”) (supporting a threshold that is significantly less than \$100,000); EarthRights International (Feb. 3, 2012) (“ERI 3”) (pointing to the \$15,000 threshold used by the London Stock Exchange’s Alternative Investment Market).

consistent with international standards, and the term “not de minimis” indicates that a threshold significantly less than \$1,000,000, is necessary to further the transparency goals of the statute.

### **Request for Comment**

17. Should we define “not de minimis” differently than as proposed? For example, are there any data or have there been any recent developments suggesting that a \$100,000 threshold is too low or too high? What would be the effect if we adopted a threshold significantly different from those established by other countries for their payment disclosure regimes? Should we include a mechanism to adjust periodically the de minimis threshold to reflect the effects of inflation? If so, what is an appropriate interval for such adjustments and what should the basis be for making any such adjustments in light of our understanding that the appropriate focal point for determining whether a payment is “not de minimis” is in relation to host countries?
18. Should we provide additional guidance on when or how a resource extraction issuer would have to aggregate a series of related payments for purposes of determining whether the \$100,000 threshold has been met? If so, what specific guidance should we provide?
19. Should we include any provisions to lessen the potential reporting costs for smaller reporting companies or emerging growth companies? For example, should we provide a higher “de minimis” threshold for certain categories of issuers generally or for a certain length of time? Would doing so be consistent with Section 13(q)?

#### **D. Payments by “a Subsidiary...or an Entity Under the Control of...”**

In addition to requiring an issuer to disclose its own payments, Section 13(q) also requires a resource extraction issuer to disclose payments by a subsidiary or an entity under the control of the issuer made to a foreign government or the Federal Government relating to the commercial development of oil, natural gas, or minerals. In a change from the 2012 Rules, however, the proposed rules would define the terms “subsidiary” and “control” based on accounting principles rather than using the definitions of those terms provided in Rule 12b-2.<sup>175</sup> We believe that this change is appropriate in light of the significant international developments since the 2012 Rules were vacated. Specifically, the proposed approach would complement two major international transparency regimes, the EU Directives and ESTMA, neither of which were in place when the 2012 Rules were adopted.<sup>176</sup> The proposed approach should therefore support international transparency promotion efforts by fostering greater consistency and comparability of payments disclosed by resource extraction issuers. As such, we believe it is consistent with our statutory mandate to support the commitment of the Federal Government to international transparency promotion efforts, to the extent practicable.<sup>177</sup>

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<sup>175</sup> Under Exchange Act Rule 12b-2 [17 CFR 240.12b-2], “control” (including the terms “controlling,” “controlled by” and “under common control with”) is defined to mean “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.” Rule 12b-2 also defines “subsidiary” (“A ‘subsidiary’ of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries). See also the definitions of “majority-owned subsidiary,” “significant subsidiary,” and “totally-held subsidiary” in Rule 12b-2.

<sup>176</sup> See, e.g., EU Accounting Directive, Article 44 (providing for the preparation of consolidated reports, subject to limited exceptions). ESTMA provides that “control” includes both direct and indirect control, but Section 2.1 of the ESTMA Guidance states that “[w]here one business controls another enterprise under the accounting standards applicable to it . . . that will generally be sufficient evidence of control for purposes of the Act.”

<sup>177</sup> In light of the changes in the international landscape, we have also given further consideration to commenters’ concerns with the potential compliance impact of the 2012 Rules as proposed. See letters from API 1, API (Nov. 7, 2013) (“API 6”); Barrick Gold, British Petroleum p.l.c. (Feb. 11, 2011) (“BP 1”); Cleary;

Under the proposed approach, a resource extraction issuer would have “control” of another entity when the issuer consolidates that entity or proportionately consolidates an interest in an entity or operation under the accounting principles applicable to its financial statements included in the periodic reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act. Thus, for purposes of determining control, the resource extraction issuer would follow the consolidation requirements under generally accepted accounting principles in the United States (“U.S. GAAP”) or under the International Financial Reporting Standards as issued by the International Accounting Standards Board (“IFRS”), as applicable.<sup>178</sup> The extent to which the controlled entity is consolidated would determine the extent to which payments made by that entity would need to be disclosed. For example, a resource extraction issuer that proportionately consolidates an entity would have to report that entity’s eligible payments on a proportionate basis, listing the proportionate interest.

In addition, as commenters have noted, using this definition would be more transparent for investors and less costly for issuers, because issuers already apply the definition for financial reporting purposes.<sup>179</sup> As such, it would facilitate compliance with the proposed rules. It also would have the benefit of limiting the potential overlap of the disclosed payments because under

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ExxonMobil 1; General Electric (Mar. 4, 2011) (“GE”); NMA 2; NYSBA Committee; Petroleo Brasileiro S.A. (Feb. 21, 2011) (“Petrobras”); RDS 2; Rio Tinto plc (Mar. 2, 2011) (“Rio Tinto”); and Statoil. See also 2012 Adopting Release at Section II.D.4.b (discussing comments related to the definition of “control” proposed in the 2010 Proposing Release).

<sup>178</sup> See Accounting Standards Codification (“ASC”) 810, Consolidation, IFRS 10, Consolidated Financial Statements and IFRS 11, Joint Arrangements for guidance. A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or IFRS, and files with the Commission a reconciliation to U.S. GAAP would be required to determine whether or not an entity is under its control using U.S. GAAP.

<sup>179</sup> See letter from API 6 (supporting this approach). But see letters from BHP Billiton Limited (Oct. 15, 2015) (“BHP”); Global Witness 2; Publish What You Pay (Mar. 14, 2014) (“PWYP 4”); Resource Revenue Transparency Working Group (Jan. 16, 2014) (“RRTWG”) supporting alternative definitions.

applicable financial reporting principles, generally only one party can control an entity, and therefore consolidate, that entity. Further, the proposed approach may enhance the quality of the reported data since each resource extraction issuer is required to provide audited financial statement disclosure of its significant consolidation accounting policies in the notes to the audited financial statements included in its existing Exchange Act annual reports.<sup>180</sup> The disclosure of these accounting policies would provide greater transparency about how the issuer determined which entities and payments should be included within the scope of the required disclosures. Finally, a resource extraction issuer's determination of control under the proposed rules would be subject to the audit process as well as to the internal accounting controls that issuers are required to have in place with respect to reporting audited financial statements filed with the Commission.<sup>181</sup>

In the 2012 Rules, we stated that “determinations made pursuant to the relevant accounting standards applicable for financial reporting may be indicative of whether control exists, [but] we do not believe it is determinative in all cases.”<sup>182</sup> While the determination of control under applicable accounting principles is not identical to the determination under Rule 12b-2, we believe that there is significant overlap between the entities that an issuer would consolidate under the applicable accounting standards and the entities that an issuer would have control over under Rule 12b-2. Taking into account the various considerations discussed above,

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<sup>180</sup> See ASC 235-10-50; IFRS 8. See also Rules 1-01, 3-01, and 4-01 of Regulation S-X [17 CFR 210.1-01, 2-01 and 4-01].

<sup>181</sup> See Exchange Act Section 13(b)(2)(B) [15 U.S.C. 78m(b)(2)(B)]. See also Rules 13a-15 [17 CFR 240.13a-15] and 15d-15 [17 CFR 240.15d-15]. We note, however, that the proposed rules would not create a new auditing requirement.

<sup>182</sup> 2012 Adopting Release at 95 [77 FR 56387].

we believe that defining the term “control” using accounting principles strikes the appropriate balance between providing reliable and accurate disclosure to support international transparency promotion efforts and reducing potential compliance costs for resource extraction issuers.

### **Request for Comment**

20. Should we define the term “control” based on applicable accounting principles, rather than using Rule 12b-2 of the Exchange Act? Why or why not? If so, should we allow resource extraction issuers to report eligible payments made by proportionately consolidated entities on a proportionate basis, as proposed, or modify this requirement? Please provide your supporting rationale. Is there some other definition we should use? If so, why?
21. Are there significant differences between the scope of the entities that would be covered by our proposed rules and by Rule 12b-2? If so, please identify the potential differences and the types of entities and payments that would be affected. Are there certain industries, jurisdictions, or project types that may be more impacted by using the proposed rules’ definition of “control” rather than the Rule 12b-2 definition?
22. Is there an alternative approach to what we have proposed, other than using Rule 12b-2, that would better achieve the transparency objectives of Section 13(q) while minimizing the cost of compliance? For example, are there any aspects of the EU Directives, ESTMA or other international transparency initiatives that should be considered so as to enhance the comparability and consistency of the disclosed payments? If so, which aspects and why.

23. Are there significant differences between the consolidation principles in U.S. GAAP and IFRS that could affect the comparability of the disclosure that would be required by the proposed rules? If so, is there a way to modify the definition of “control” to enhance the comparability of the disclosure?

**E. Definition of “Project”**

**1. General**

Consistent with Section 13(q), the proposed rules would require a resource extraction issuer to disclose payments made to governments relating to the commercial development of oil, natural gas, or minerals by type and total amount per project.<sup>183</sup> In the 2012 Adopting Release, the Commission declined to define “project” and stated its belief that not adopting a definition had the benefit of giving issuers flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates, or the issuer’s size.<sup>184</sup> After further consideration of the objectives of the statute and in light of international transparency developments since adoption of the 2012 Rules, we are proposing to define the term “project.” Specifically, we are proposing a definition modeled on the definition found in the EU Directives and the ESTMA Specifications; the difference being that the proposed definition would afford resource extraction issuers additional flexibility on how to treat operations involving multiple, related contracts.<sup>185</sup>

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<sup>183</sup> For commenters supporting project level disclosure, see, e.g., letters from NACE; PWYP-ZIM; PWYP-IND. These letters provide examples of situations in which either project-level reporting has achieved beneficial effects or are necessary to achieving such effects.

<sup>184</sup> See the 2012 Adopting Release at 85 [77 FR 56385].

<sup>185</sup> A number of commenters expressed support for international consistency and the use of the EU Directives’ definition of “project.” See letters from Allianz Global Investors (Apr. 28, 2014) (“Allianz 1”); Allianz Global

The EU Directives and ESTMA Specifications both state that a “project” means “the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government. Nonetheless, if multiple such agreements are substantially interconnected, this shall be considered a project.”<sup>186</sup> The EU Directives and ESTMA Specifications go on to define “substantially interconnected” as “a set of operationally and geographically integrated contracts, licenses, leases or concessions or related agreements with substantially similar terms that are signed with the government and give rise to payment liabilities.”<sup>187</sup>

Similar to the EU Directives and the draft Canadian definitions, we are proposing to define “project” as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government.<sup>188</sup> Our proposed definition, also similar to the EU Directives and the draft Canadian definitions, would allow issuers to treat multiple agreements that are both operationally and geographically interconnected as a single project.<sup>189</sup> Unlike the EU Directives and draft Canadian definitions, our proposed definition of “project” would not include the requirement that the agreements have “substantially similar terms.” In that regard, we understand that operations under one agreement may lead to the parties entering into a second agreement for operations in a

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Investors (Aug. 8, 2014) (“Allianz 2”); Arachnys Information Services (May 28, 2014 (“Arachnys”)); Global Witness 2; PWYP 4; and Third Swedish National Pension Fund (Apr. 28, 2014) (“TSNPF”).

<sup>186</sup> Article 41(4) of the EU Accounting Directive; ESTMA Specifications, Section 2.2.2. ESTMA Specifications defining “project” would be promulgated pursuant to Section 9(5) of ESTMA, which authorizes the Minister to specify the “way in which payments are to be organized or broken down in the report – including on a project basis – and the form and manner in which a report is to be provided.”

<sup>187</sup> Recital 45 of the EU Accounting Directive.

<sup>188</sup> See proposed Item 2.01(c)(10) of Form SD.

<sup>189</sup> Id.

geographically contiguous area. If a change in market conditions or other circumstances compels a government to insist on different terms for the second agreement, then under our proposed definition the use of those different terms by themselves would not preclude treating the second agreement as the same project when, operationally and geographically, work under the second agreement is a continuation of work under the first.

In order to assist resource extraction issuers in determining whether two or more agreements may be treated as a single project, we are proposing an instruction that provides a non-exclusive list of factors to consider when determining whether agreements are “operationally and geographically interconnected” for purposes of the definition of project, no single one of which would necessarily be determinative. Those factors include whether the agreements relate to the same resource and the same or contiguous part of a field, mineral district, or other geographic area, whether they will be performed by shared key personnel or with shared equipment, and whether they are part of the same operating budget.<sup>190</sup> Furthermore, we are preserving the approach taken in the 2012 Rules by proposing an instruction clarifying that issuers would not be required to disaggregate payments that are made for obligations levied on the issuer at the entity level rather than the project level.<sup>191</sup>

In proposing this approach, we have considered the wide variety of recommendations provided by commenters, both before and after the 2012 Adopting Release, including defining

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<sup>190</sup> See proposed Instruction 12 to Item 2.01 of Form SD.

<sup>191</sup> See proposed Instruction 4 to Item 2.01 of Form SD. Thus, if an issuer has more than one project in a host country, and that country’s government levies corporate income taxes on the issuer with respect to the issuer’s income in the country as a whole, and not with respect to a particular project or operation within the country, the issuer would be permitted to disclose the resulting income tax payment or payments without specifying a particular project associated with the payment. See also Section II.C.1 above.

“project” as a reporting unit or by reference to a materiality standard.<sup>192</sup> Nevertheless, we see several advantages to our proposed approach over the alternatives. Our proposed definition of the term project has the advantage of providing clarity by stipulating that a project is contract-based.<sup>193</sup> Also, taking an approach that shares certain core elements with the definition used in the EU Directives and the ESTMA Specifications would further international transparency promotion efforts.<sup>194</sup> Such an approach should also reduce costs for companies listed in both the United States and those jurisdictions by not requiring different disaggregation of project-related costs due to different definitions of the term “project.” In addition, a definition having substantial similarities might enable companies to take advantage of equivalency provisions available in other jurisdictions.<sup>195</sup> We also note that DOI supports a definition of project at the contract level.<sup>196</sup>

While substantially consistent with other international disclosure regimes in its overall approach, our proposed definition would differ in one aspect. Specifically, it would provide

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<sup>192</sup> For a more extensive discussion of comments received on the definition of “project” prior to the 2012 Adopting Release, please see Section II.D.3 of the 2012 Adopting Release.

<sup>193</sup> See 2012 Adopting Release at 85-86 [77 FR 56385].

<sup>194</sup> See letter from Transparency International-USA (June 9, 2014) (“TI-USA 1”). See also letter from State Department (“applaud[ing] the EU’s enactment of its Accounting and Transparency Directives and Canada’s enactment of its Extractive Sector Transparency Measure Act” and explaining that a Commission rule requiring disclosure “compatible with these transparency measures would further advance the United States’ foreign policy interests”). We also note that the EITI’s project reporting disclosure requirements are tied to the European Union and U.S. definition of project. See EITI Standard, at 31 (“Reporting at project level is required, provided that it is consistent with the United States Securities and Exchange Commission rules and the forthcoming European Union requirements.”). Thus, adopting a definition of “project” similar to that in the EU Directives would also promote international transparency by aligning EITI compliance with our proposed rules, the EU Directives, and, if adopted in their current form, Canada’s ESTMA Specifications.

<sup>195</sup> See, e.g., Article 46 of the EU Accounting Directive; Section 10(1) of ESTMA.

<sup>196</sup> See letter from DOI 1. In this regard, DOI noted that it “interpret[s] this definition to mean that for oil, gas, and renewables a project is at either the lease or the agreement level and for coal and other hardrock mining, it would mean that a project was at the permit, claim, or plan of operation level.”

additional flexibility compared to those regimes by allowing for aggregation of payments made for activities that relate to multiple agreements that are both operationally and geographically interconnected without requiring the terms of the agreements to be substantially similar. In that respect, it should reduce the burdens associated with disaggregating payments. It may also reduce the risk of sensitive information being released, which should help alleviate concerns about competitive harm and the security of personnel and assets, while also providing payment information that is useful to citizens in resource-rich countries.

We also found it significant that several of the alternative definitions of “project” suggested previously by commenters would likely result in disclosure of payment information that is more greatly aggregated and less granular than what would be provided by the definition we are proposing. For example, commenters suggested defining “project” at the country level;<sup>197</sup> defining “project” as a reporting unit;<sup>198</sup> defining “project” in relation to a particular geologic resource, such as a “geologic basin” or “mineral district;”<sup>199</sup> or defining “project” by reference to a materiality standard.<sup>200</sup> Each of these approaches, however, would likely result in disclosure that is more aggregated (and therefore less detailed) on a geographical basis, and potentially less useful for purposes of serving the statute’s objective of promoting payment transparency to combat global corruption. As described above, disaggregated information provides greater

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<sup>197</sup> See letters from API 1; ExxonMobil 1; Petrobras; and Royal Dutch Shell (Oct. 25, 2010) (“RDS 1”).

<sup>198</sup> See 2012 Adopting Release, n.283 and accompanying text.

<sup>199</sup> See 2012 Adopting Release, n.286 and accompanying text.

<sup>200</sup> See 2012 Adopting Release, n.291 and accompanying text.

transparency to local communities that may seek to verify that they are receiving payments to which they are entitled.<sup>201</sup>

## **2. The API Proposal**

In a comment submitted after the 2012 Rules were vacated, and in subsequent presentations to the staff, API has advanced a proposal that would “defin[e] projects according to subnational political jurisdictions.”<sup>202</sup> Under API’s proposal, all of an issuer’s resource extraction activities within a subnational political jurisdiction would be treated as a single “project” to the extent that these activities involve the same resource (e.g., oil, natural gas, coal) and to the extent that they are extracted in a generally similar fashion (e.g., onshore or offshore extraction, or surface or underground mining). To illustrate how its proposed definition would work, API indicates that all of an issuer’s extraction activities “producing natural gas in Aceh, Indonesia would be identified as ‘Natural Gas/Onshore/Indonesia/Aceh.’” Similarly, API indicates that “[o]nshore development in the Niger River delta area would be ‘Oil/Onshore/Nigeria/Delta.’” API contends that this approach would be preferable to a contract-based definition of project, such as the definition used in the EU Directives or in the proposed rules, because its proposed definition would provide sufficiently localized information to help citizens hold their leaders accountable for the resource wealth generated in their region while also minimizing competitive harm to resource extraction issuers.

For several reasons, we are not proposing such a definition of “project.” First, we do not agree that engaging in similar extraction activities across a single subnational political

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<sup>201</sup> See Section I.E.2.

<sup>202</sup> See letters from API 6 and American Petroleum Institute (Apr. 15, 2014) (“API 7”).

jurisdiction provides the type of defining feature to justify aggregating those various activities together as a solitary project. To put this in perspective using API's own illustrations, API's proposed definition would treat every natural gas extraction well that an issuer may have drilled across the 22,500 square miles of Aceh, Indonesia—a territory that is slightly larger than the total land area of the States of Massachusetts and Maryland—as a solitary project, primarily because those wells have been drilled in the same subnational political jurisdiction. Similarly, under API's proposed definition, every oil well that an issuer drills across the approximately 27,000 square miles of the Niger Delta—a territory that is slightly larger than the total land area of the States of West Virginia and Delaware—would be a single project.<sup>203</sup>

Although a resource extraction issuer could enter into a contract that covers an entire country or subnational political jurisdiction, it is our understanding that this is not common industry practice.<sup>204</sup> Rather, the typical contract area for oil and gas exploration is between approximately 400 to 2000 square miles.<sup>205</sup> Indeed, a typical U.S. oil and gas offshore federal lease covers approximately three square miles.<sup>206</sup> Also, a variety of oil and gas concessions maps show that such concessions are generally significantly smaller than major subnational

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<sup>203</sup> For a visual representation of how the disclosure under the API Proposal would contrast with the more localized, granular disclosure under our proposed rules, compare, for example, this map of the entire Niger Delta (<https://www.stratfor.com/image/niger-delta-oil-fields> (last visited Dec. 8, 2015)) with this map of Niger Delta oil concessions ([http://www.nigeria-oil-gas.com/nigeria\\_oil\\_&\\_gas\\_concessions\\_map\\_&\\_licenses-34-1-2-c.html](http://www.nigeria-oil-gas.com/nigeria_oil_&_gas_concessions_map_&_licenses-34-1-2-c.html) (last visited Dec. 8, 2015)).

<sup>204</sup> See Center for Economic and Management, *Oil and Gas Exploration and Production, Reserves, Costs, and Contracts*, Institut Francais Du Petrole Publications (2004), Ch. 5 (“Oil and Gas Exploration”). The oil and gas and mining engineers on the Commission’s staff, based on their collective industry experience, also confirm their understanding of industry practice.

<sup>205</sup> Oil and Gas Exploration, 183-84.

<sup>206</sup> See, e.g., U.S. Outer Continental Shelf Lease Blocks available at <http://www.arcgis.com/home/item.html?id=0d6b1a589b814fa58ba66aadcc0b1c65> (last visited Dec. 8, 2015).

political jurisdictions.<sup>207</sup> Similarly, mining concessions are generally significantly smaller than major subnational jurisdictions. In fact, we understand that development and production contracts, which are generally entered into only after successful exploration and which generate the majority of revenue payments,<sup>208</sup> will typically cover only a single mine.<sup>209</sup> Accordingly, we believe that for oil, gas and minerals, a contract-based definition of “project” would provide more granular disclosure than API’s proposed definition and similar definitions focusing on national or subnational political jurisdictions.<sup>210</sup>

Moreover, by so heavily focusing on subnational political jurisdictions as a defining consideration, API’s definition appears to disregard the economic and operational considerations that we believe would more typically—and more appropriately—be relevant to determining whether an issuer’s various extraction operations should be treated together as one project. This stands in contrast to the definition of “project” under the EU Directives and the ESTMA

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<sup>207</sup> See, e.g., letter from Oxfam America (Dec. 3, 2015) (“Oxfam 3”) (including a Sonangol map of Angola Concession and a 2014 West Africa Offshore Oil and Gas Concession Map); Brazil 2011 Oil and Gas Concession Map, *Offshore Magazine* available at [http://www.offshore-mag.com/content/dam/etc/medialib/platform-7/offshore/maps-and\\_posters/BrazilMap2011-062111Ads.pdf](http://www.offshore-mag.com/content/dam/etc/medialib/platform-7/offshore/maps-and_posters/BrazilMap2011-062111Ads.pdf) (last visited Dec. 8, 2015).

<sup>208</sup> While mineral exploration rights are subject to government leases, they do not yield significant payments to governments. See generally Diana Dalton, *A Global Perspective on Mining Legislation*, in 1 *SME Mining Engineering Handbook* 331-337 (P. Darling ed.) (2011) and A. Nunan, *Understanding Overlaps - Mining Tenure Versus the Rest of the World*, The AusIMM New Leaders’ Conference Brisbane, QLD (May 2007).

<sup>209</sup> Although the size of a mining project can vary, and a single mining project can cover several contiguous exploration blocks, even large mining projects are still significantly smaller than a major subnational jurisdiction or a mining district. For example, Vulcan Materials Company’s McCook Quarry in Chicago, Illinois, a large limestone quarry, covers approximately one square mile. See NPDES Permit No. ILG840200 available at <http://www.epa.state.il.us/water/permits/non-coal-mines/show-file.php?recordID=137>. Freeport-McMoRan Inc.’s Morenci copper mine in Morenci, Arizona, a large copper mine, covers approximately 102 square miles. Freeport-McMoRan Inc., Form 10-K (FYE Dec. 31, 2014) at 8. AngloGold Ashanti’s Iduapriem Mine, a small to medium gold mine, covers approximately 13 square miles. AngloGold Ashanti Limited, Form 20-F (FYE Dec. 31, 2014) at 59.

<sup>210</sup> Although contract areas are often larger during the exploration phase when the presence of economically viable resources is less certain, such areas are significantly reduced when the exploration contract is extended or when the contract holder enters the exploitation phase of a project. Oil & Gas Exploration, 183-86.

Specifications. Second, API's proposal would not generate the level of transparency that, as discussed above in Section I.E, we believe would be necessary and appropriate to achieve the U.S. Government's anticorruption and transparency objectives.<sup>211</sup> By permitting companies to aggregate their oil, natural gas, and other extraction activities over large territories, API's definition would not provide local communities with payment information at the level of granularity necessary to enable them to know what funds are being generated from the extraction activities in their particular areas.<sup>212</sup> Again, to put this in context using API's illustrations, in Aceh there are eight separate regions and five autonomous cities; the approximately 4 million residents of these areas within Aceh would not be able to distinguish which revenues came from their local projects versus projects in other areas of Aceh. Much the same would be true for the nearly 30 million people that occupy the nine separate states within the Niger River Delta. As a result, the local residents in Aceh and the Niger Delta would be unable to ensure that they are

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<sup>211</sup> See Letter from Global Witness 2. See also, e.g., Natural Resource Governance Institute (Sept. 23, 2015) ("NRGI") (stating that API's approach "would prevent investors or citizens from using disclosed project-level data in conjunction with annual reports or other publicly available information" and "make it difficult for citizens to identify the payments related to an *actual* project, . . . preventing stakeholders from using such disclosures to inform risk analyses or carry out monitoring and oversight activities.") (emphasis in original); Iraqi Transparency Alliance ("We recommend that the definition of project align with the August 2012 SEC rule or the EU Accounting and Transparency Directives, and that the SEC rejects the American Petroleum Institute's reporting proposal, which, in particular by failing to identify which companies made which payments, would render such obscure information useless."); PWYP-IND ("The American Petroleum Institute proposes to report at the first tier below the central government. In my country, that would mean that companies would report how much they paid for access to resources in each province. Clearly, such a reporting scheme would prove completely unsatisfactory in Indonesia, as it would leave citizens in producing and adjacent districts with no way to know whether their district governments received the money they were owed.").

<sup>212</sup> See letter from NACE ("Project level payment data is also necessary to enable communities to conduct an informed cost-benefit analysis of the projects in their backyards. . . . For local communities affected by extractives projects, knowledge of the total, combined amount a company has paid the government for *all* extractives projects is of little value; what matters most to a community is the revenue generated from the specific projects in its backyard. When a single company operates multiple projects, as commonly occurs in Sierra Leone, community oversight becomes nearly impossible without data on each specific project.").

receiving the funds from the national and subnational government that they might be entitled to, either under law or other governing arrangements.<sup>213</sup>

Similarly, local communities (and others assisting them) would be unable to assess certain costs and benefits of particular licenses and leases to help ensure that the national government or the subnational government had not struck a corrupt or otherwise inappropriate arrangement, and these local residents would be unable to meaningfully compare the revenues from the individual extraction efforts within the subnational jurisdiction to potentially verify that companies were paying a fair price for the concessions. Further, aggregating the extraction activities into a single project could undercut the deterrent effect that governmental officials and companies would experience; as discussed above, the more detailed and disaggregated the project-level disclosures, the greater likelihood that unlawful misuse of those funds may be deterred or detected.<sup>214</sup>

We acknowledge that API's definition of "project" could lower the potential for competitive harm when compared to our proposed approach, which requires public disclosure of

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<sup>213</sup> See also letter from PWYP-CAM ("The Cameroonian Mining Code states that the municipality and local communities are entitled to 25 percent of the Ad Valorem tax and Extraction tax paid by companies for the projects located in their jurisdiction. These payments are collected by the central tax authorities and then transferred to the municipal councils. Of the 25 percent of these payments allocated to the municipal councils, 15 percent is for the municipal council and 10 percent is for the local populations directly affected by the extractive operations. However, without project-level fiscal data, local populations will not be able to cross-check whether or not they are receiving the share of revenues they are legally entitled to.").

<sup>214</sup> We note that API's proposal suffers from an additional substantial defect in our view. Under API's proposal, the project-level disclosures that companies would make in their filings to the Commission would not be publicly released. Instead, these disclosures would be electronically aggregated and anonymized, and only then made publicly available. This would further undermine the effectiveness of the public disclosures in promoting the U.S. Government's foreign policy goals. See generally letter from NRG (noting that in the East Kalimantan Province of Indonesia there are five U.S. listed companies with as many as 11 different production sharing contracts that could all be identified as "Indonesia/Offshore/Oil/East Kalimantan.").

contract-level data. Nevertheless, as we discuss below,<sup>215</sup> we believe that the potential for competitive harm resulting from our proposed disclosure requirements is significantly reduced due to the recent adoption of a similar definition of “project” in the European Union and the recent proposal of a similar definition in Canada. As discussed above, we also believe that a disclosure requirement that is in accordance with the emerging international transparency regime is consistent with Section 13(q) and its legislative history. Thus, we believe that the definition of project that we are proposing is, on balance, necessary and appropriate notwithstanding the potential competitive concerns that may result in some instances.<sup>216</sup>

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24. Should we, as proposed, define “project” as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government? Why or why not? Given the U.S. foreign policy interests reflected in Section 13(q), does our proposed definition advance the governmental interests in promoting transparency and combatting global corruption? Should we define “project” in a different manner? If yes, how should we define the term? For example, should we adopt a definition of “project” that is identical to that found in the EU Directives and the ESTMA Specifications?

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<sup>215</sup> See Section III.B.2.c below.

<sup>216</sup> In this regard, and as we discuss in Section II.G.3 below, we will consider using our existing authority under the Exchange Act to provide exemptive relief at the request of a resource extraction issuer, if and when warranted. We believe that this case-by-case approach to exemptive relief would permit us to tailor any relief to the particular facts and circumstances presented, which could include facts related to potential competitive harm.

25. Is there an alternative to using a contract based definition of “project” that would promote international transparency while mitigating compliance costs to resource extraction issuers?
26. Would our proposed contract-based definition of “project” lead to more granular disclosure than API’s suggested definition? What is the typical geopolitical and geographic scope of contracts in the resource extraction industry? Are the examples discussed above representative of current industry practice?
27. Should we permit two or more agreements that are both operationally and geographically interconnected to be treated by the issuer as a single project, as proposed? What are the advantages or disadvantages of such a treatment? Should we instead require that these agreements have substantially similar terms as in the EU Directives and the ESTMA Specifications?
28. Should we use another jurisdiction’s definition of “project” or one suggested by commenters, such as API? If so, which definition and why?
29. Would defining “project” in the manner we are proposing, or a similar manner, allow for comparability of data among issuers? How could the proposed rules be changed to improve such comparability?
30. Should we adopt the approach we took in the 2012 Rules and not define “project?” If so, please explain why.

**F. Definition of “Foreign Government” and “Federal Government”**

In Section 13(q), Congress defined “foreign government” to mean a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a

foreign government, while granting the Commission the authority to determine the scope of the definition.<sup>217</sup> Consistent with the 2012 Rules, we are proposing a definition of “foreign government” that would include a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.<sup>218</sup> Although we acknowledge the concerns of commenters who suggested limiting the definition of foreign government to foreign national governments,<sup>219</sup> we believe that the definition also should include foreign subnational governments. The proposed definition is consistent with Section 13(q), which requires an issuer to identify, for each disclosed payment, the government that received the payment and the country in which the government is located.<sup>220</sup> It is also consistent with the EU Directives, ESTMA Guidance, and the EITI.<sup>221</sup>

For purposes of identifying the foreign governments (as defined in proposed Item 2.01(c) of Form SD) that received the payments, as required by proposed Item 2.01(a)(7) of Form SD, we believe that an issuer should identify the administrative or political level of subnational government that is entitled to a payment under the relevant contract or foreign law. As noted in the 2012 Adopting Release, if a resource extraction issuer makes a payment that meets the

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<sup>217</sup> 15 U.S.C. 78m(q)(1)(B).

<sup>218</sup> See proposed Item 2.01(c)(7) of Form SD.

<sup>219</sup> See, e.g., letter from Statoil (stating that requiring disclosure of payments to national governments only would be more fair and consistent with other international transparency initiatives).

<sup>220</sup> See 15 U.S.C. 78m(q)(2)(D)(ii)(V).

<sup>221</sup> See EU Accounting Directive, Article 41(3) (“Government means any national, regional or local authority . . .”); ESTMA Guidance, Section 3.2 (“[A] Payee is . . . any government . . . at a national, regional, state/provincial or local/municipal level . . .”); EITI Standard, at 29 (requiring the disclosure and reconciliation of material payments to subnational government entities in an EITI Report).

definition of payment to a third party to be paid to the government on its behalf, disclosure of that payment would be covered under the proposed rules.

Additionally, the proposed rules clarify that a company owned by a foreign government means a company that is at least majority-owned by a foreign government.<sup>222</sup> This clarification should address the concerns that some commenters had about when an issuer would be required to disclose payments made to a foreign government-owned company.

The proposed rules also clarify that “Federal Government” means the United States Federal Government.<sup>223</sup> Although we acknowledge that the European Union and Canada have taken different approaches by requiring or proposing to require the disclosure of payments to domestic subnational governments, we believe that Section 13(q) is clear in only requiring disclosure of payments made to the Federal Government in the United States and not to state and local governments. As we noted in our previous releases, typically the term “Federal Government” refers only to the U.S. national government and not the states or other subnational governments in the United States.<sup>224</sup>

### **Request for Comment**

31. Should the definition of “foreign government” include a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as proposed? If not, why not? Should it include anything else?

32. Under Section 13(q) and the proposal, the definition of “foreign government” includes “a company owned by a foreign government.” We are proposing to include an instruction in

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<sup>222</sup> See proposed Item 2.01(c)(7) of Form SD.

<sup>223</sup> See proposed Item 2.01(a) of Form SD.

<sup>224</sup> 2012 Adopting Release at 101 [77 FR 56389]; 2010 Proposing Release at 44 [75 FR 80988].

the rules clarifying that a company owned by a foreign government is a company that is at least majority-owned by a foreign government. Should we provide this clarification in the rules? Should a company be considered to be owned by a foreign government if government ownership is less than majority-ownership? Should the rules provide that a company is owned by a foreign government if government ownership is greater than majority-ownership? If so, what level of ownership would be appropriate and why? Are there some levels of ownership of companies by a foreign government that should be included in or excluded from the proposed definition of “foreign government?”

33. Are there some levels of subnational government that should be excluded from the proposed definition of foreign government? If so, please explain why and provide specific examples of those levels of subnational government that should be excluded.

34. Should we provide any additional guidance on the statutory terms “foreign government” and “Federal Government?” If so, what guidance would be helpful?

## **G. Disclosure Required and Form of Disclosure**

### **1. Annual Report Requirement**

Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report but otherwise does not specify the location of the disclosure, either in terms of a specific form or in terms of location within a form. Consistent with the approach in the 2012 Rules, we believe that resource extraction issuers should provide the required disclosure about payments on Form SD.

Form SD is already used for specialized disclosure not included within an issuer’s periodic or current reports, such as the disclosure required by the rule implementing

Section 1502 of the Act.<sup>225</sup> We also believe that using Form SD would facilitate interested parties' ability to locate the disclosure and address issuers' concerns about providing the disclosure in their Exchange Act annual reports on Forms 10-K, 20-F, or 40-F.<sup>226</sup> For example, requiring the disclosure in a separate form, rather than in issuers' Exchange Act annual reports, should alleviate concerns about the disclosure being subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14<sup>227</sup> and would allow the Commission, as discussed below, to adjust the timing of the submission without directly affecting the broader Exchange Act disclosure framework.<sup>228</sup> As proposed, Form SD would require issuers to include a brief statement in the body of the form in an item entitled, "Disclosure of Payments By Resource Extraction Issuers," directing readers to the detailed payment information provided in the exhibits to the form.

In addition to considering allowing issuers to use Forms 10-K, 20-F, or 40-F, we also considered commenters' suggestions that we require the disclosure on Form 8-K or Form 6-K.<sup>229</sup> We are not proposing that approach, however, because we agree with those commenters who observed that the resource extraction payment disclosure differs from the disclosure required by

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<sup>225</sup> Rule 13p-1 [17 CFR 240.13p-1]. See also Exchange Act Release No. 34-67716 (Aug. 22, 2012), 77 FR 56273 (Sept. 12, 2012) ("Conflict Minerals Release").

<sup>226</sup> See also 2012 Adopting Release, nn.366-370 and accompanying text. Under the rules proposed in the 2010 Proposing Release, a resource extraction issuer would have been required to furnish the payment information in its annual report on Form 10-K, Form 20-F, or Form 40-F. Certain commenters continue to support this approach. See letter from Susan Rose-Ackerman (Mar. 28, 2014) ("Ackerman") ("[t]here is no need for the cost of a separate report.").

<sup>227</sup> See 2012 Adopting Release, n.369.

<sup>228</sup> In this regard, we considered permitting the resource extraction payment disclosure to be filed in an amendment to Form 10-K, 20-F, or 40-F, as applicable, but we are concerned that this might give the false impression that a correction had been made to a previous filing. See also 2012 Adopting Release, n.379 and accompanying text.

<sup>229</sup> See 2012 Adopting Release, n.371 and accompanying text.

Form 8-K or 6-K.<sup>230</sup> In this regard, we note that Section 13(q) requires that the disclosure be provided in an annual report rather than on a more rapid basis, unlike the disclosure of material corporate events, which must be filed on a “current” basis using Form 8-K or 6-K.<sup>231</sup>

While Section 13(q) mandates that a resource extraction issuer include the relevant payment disclosure in an “annual report,” it does not specifically mandate the time period in which a resource extraction issuer must provide the disclosure. Although two commenters on the 2010 Proposing Release believed that the reporting period for the resource extraction disclosure should be the calendar year,<sup>232</sup> two other commenters suggested that the reporting period for Form SD should be the fiscal year.<sup>233</sup> We also considered the possibility that certain resource extraction issuers may be required to file two reports on Form SD every year if we use a reporting period based on the fiscal year and they are also subject to the May 31<sup>st</sup> conflict minerals disclosure deadline.<sup>234</sup> Despite the suggestions of certain commenters and our consideration of the conflict minerals disclosure requirements, we believe that the fiscal year is the more appropriate reporting period for the payment disclosure. We believe it would reduce resource extraction issuers’ compliance costs when compared to a fixed, annual reporting requirement by allowing them to use their existing tracking and reporting systems for their public reports to also track and report payments under Section 13(q). Also, although minimizing the

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<sup>230</sup> See, e.g., letter from Calvert 1.

<sup>231</sup> A Form 8-K report is required to be filed or furnished within four business days after the occurrence of one or more of the events required to be disclosed on the form, unless the form specifies a different deadline (e.g., for disclosures submitted to satisfy obligations under Regulation FD [17 CFR 243.100 et seq]). See General Instruction B.1 of Form 8-K [17 CFR 249.308].

<sup>232</sup> See letters from API 1 and ExxonMobil 1.

<sup>233</sup> See letters from AngloGold and RDS 2.

<sup>234</sup> General Instruction B.1 of Form SD. See also Exchange Act Rule 13p-1.

number of Form SD filings an issuer would need to make if it was also subject to the conflict minerals disclosure rules could have benefits, we do not believe that those benefits outweigh those arising from a reporting regime tailored to a resource extraction issuer's fiscal year.<sup>235</sup> Finally, we note that ESTMA and the EU Directives also require reporting based on the fiscal year, with ESTMA using the same deadline contained in the proposed rules.<sup>236</sup>

After considering the comments expressing concern over the difficulty of providing the payment disclosure within the current annual reporting cycle,<sup>237</sup> we believe it is reasonable to provide a filing deadline for Form SD that is later than the filing deadline for an issuer's annual report under the Exchange Act. Therefore, consistent with the approach under ESTMA and some commenters' suggestions,<sup>238</sup> the proposed rules would require resource extraction issuers to file Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year.<sup>239</sup>

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<sup>235</sup> Of the 877 companies that we estimate would be subject to the proposed rules, only 56 filed a Form SD pursuant to Rule 13p-1 in 2014. Out of those, all but two have a fiscal year end of December 31, which would mean that the filing deadline under the proposed rules would be very similar to the deadline under Rule 13p-1, increasing the likelihood that one report could be filed each year. Finally, we note that the conflict minerals reporting regime adopted a uniform reporting period, in part, because such a period allows component suppliers that are part of a manufacturer's supply chain to provide reports to their upstream purchasers only once a year. See Conflict Minerals Release, n.351 and accompanying text. The same reasoning would not apply to the issuer-driven disclosure under the proposed rules.

<sup>236</sup> See ESTMA, Section 9(1) ("Every entity must, not later than 150 days after the end of each of its financial years, provide the Minister with a report that discloses, in accordance with this section, the payments that it has made during that year."); EU Accounting Directive, Article 43(2) ("The report shall disclose the following information . . . in respect of the relevant financial year."); EU Transparency Directive, Article 6 ("The report shall be made public at the latest six months after the end of each financial year . . .").

<sup>237</sup> See 2012 Adopting Release, n.367 and accompanying text.

<sup>238</sup> See 2012 Adopting Release, nn.375-377 and accompanying text.

<sup>239</sup> See proposed General Instruction B.2 to Form SD.

## **Request for Comment**

35. Section 13(q) requires disclosure of the payment information in an annual report but does not specify the type of annual report. Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) on Form SD, as proposed? Should we require, or permit, resource extraction issuers to provide the payment information in an annual report on Forms 10-K, 20-F, or 40-F or on a different form? What would be the costs and benefits of each approach for users of the information or resource extraction issuers?
36. Should the proposed disclosure be subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14 or a similar requirement? Why or why not?
37. As noted above, Section 13(q) mandates that a resource extraction issuer provide the required payment disclosure in an annual report, but it does not specifically mandate the time period for which a resource extraction issuer must provide the disclosure. Is it reasonable to require resource extraction issuers to provide the mandated payment information for the fiscal year covered by the applicable annual report, as proposed? Why or why not? Should the rules instead require disclosure of payments made by resource extraction issuers during the most recent calendar year?
38. Should the filing deadline for Form SD be 150 days after the end of the most recent fiscal year as proposed? Should it be longer or shorter? Should issuers be able to apply for an extension on a case-by-case basis? Or should there be a provision for an automatic

extension with or without a showing of cause? Should we amend Exchange Act Rule 12b-25<sup>240</sup> to allow it to be used for an extension for Form SD filings?

39. Should the proposed rules provide an accommodation to filers that are subject to both Rules 13p-1 and 13q-1, such as an alternative filing deadline, to minimize the possibility that a resource extraction issuer would be required to file two Form SD filings in the same year? If so, how should that deadline be structured?

## 2. Public Filing

As noted in the U.S. District Court for the District of Columbia's opinion discussed above, Section 13(q) provides us with the discretion to determine whether or not we should require public disclosure of payments by resource extraction issuers or permit confidential filings and provide a public aggregation of this disclosure. Consistent with the 2012 Rules, we believe that requiring public disclosure would best accomplish the purpose of the statute. Therefore, as supported by numerous commenters, the proposed rules would require issuers to disclose the full payment information publicly, including the identity of the issuer.<sup>241</sup>

In response to the 2010 Proposing Release and the court's order to vacate the 2012 Rules, several commenters suggested permitting issuers to submit the payment disclosure

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<sup>240</sup> 17 CFR 240.12b-25.

<sup>241</sup> See letters from Allianz 1; Allianz 2; Africa Faith and Justice Network (Aug. 8, 2014) ("AFJN"); Calvert Investment Management (Nov. 25, 2013) ("Calvert 2"); CSCU; EarthRights International (Dec. 12, 2012) ("ERI 4"); First Swedish National Pension Fund (May 9, 2015) ("FSNPF"); Francine Cronshaw (Mar. 27, 2015) ("Cronshaw"); Global Witness 2; Global Witness (June 27, 2014) ("Global Witness 4"); Kathleen Reimer (June 10, 2014) ("Reimer"); Michael Ross (May 21, 2014) ("Ross"); OSISA-A; Oxfam America (Sep. 26, 2013) ("Oxfam 2"); PWYP 4; Publish What You Pay Coalition ("PWYP 5") (Apr. 14, 2014); PWYP-CAM; Publish What You Pay Canada (Jan. 8, 2014) ("PWYP-CAN"); PWYP-IND; Publish What You Pay United States (Feb 13, 2015) ("PWYP-US"); PWYP-ZIM; Rep. Water and 58 other members of congress (June 11, 2014) ("Rep. Waters et al."); Senators Cardin, Leahy, Lugar, Levin, Markey (Aug. 2, 2013) ("Sen. Cardin et al. 2"); Senators Cardin, Levin, Leahy, Markey, Sanders, Durbin, Johnson, Whitehouse, Merkley, Boxer, Blumenthal, Shumer (May 1, 2015) ("Sen. Cardin et al. 3"); SNS Asset Management (July 31, 2013) ("SNS"); TI-USA 1; TSNPF.

confidentially.<sup>242</sup> According to these commenters, the statute does not expressly require the submitted information itself to be publicly available. Instead, they asserted that Section 13(q)(3), which is entitled “Public Availability of Information,” requires us, to the extent practicable, to make public a compilation of the information that is required to be submitted. These commenters stated that the Commission could permit the required information to be submitted confidentially and then prepare a public compilation aggregating that information on a per-country or similarly high-level basis, which they contend would both satisfy the specific text of the statute and fulfill the underlying goal of promoting the international transparency regime of the EITI.<sup>243</sup> Other commenters disagreed with that interpretation of Section 13(q). One stated that any aggregated compilation “would be in addition to the public availability of the original company data and in no way is expected to replace the availability of that data.”<sup>244</sup> Other commenters felt that a compilation with aggregated data would provide little value to those seeking to use the information.<sup>245</sup>

Recognizing the purposes of Section 13(q) and the discretion provided in the statute, and taking into account the views expressed by various commenters, we are proposing to require resource extraction issuers to provide the required disclosure publicly. Several factors support this approach. First, the statute requires us to adopt rules that further the interests of international

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<sup>242</sup> See letters from API 1; API 6; API 7; Chevron Corporation (Jan. 28, 2011) (“Chevron 1”); ExxonMobil 1; Nexen Inc. (Mar. 2, 2011) (“Nexen”); and RDS 2.

<sup>243</sup> See id.

<sup>244</sup> Letter from Sen. Cardin et al. 1.

<sup>245</sup> See, e.g., letters from Oxfam 2 (“A compilation that presents data a high level of aggregation . . . would be largely worthless to . . . citizens seeking to use the information . . .”) and Global Witness 2 (“The Commission should justify detailed public disclosure by looking to the needs of the users of this data, including . . . transparency advocates.”).

transparency promotion efforts, to the extent practicable.<sup>246</sup> We note, in this regard, that several existing transparency regimes require public disclosure, including the identity of the issuer, without exception.<sup>247</sup> A public disclosure requirement under Section 13(q) would further the U.S. foreign policy interest in supporting international transparency promotion efforts by enhancing comparability among companies, as it would increase the total number of companies that provide project-level public disclosure. It would also be consistent with the objective of ensuring that the United States is a global “leader in creating a new standard for revenue transparency in the extractive industries.”<sup>248</sup> In addition, the United States is currently a candidate country under the EITI, which requires candidate countries to provide a framework for public, company-by-company disclosure in the EITI report. Permitting issuers to provide the required payment disclosure on a confidential basis could undermine the efforts of the USEITI to establish a voluntary payment disclosure regime for domestic operations. Moreover, the fact that issuers would be required by these other transparency promotion efforts to disclose publicly substantially the same payment information reduces the likelihood that the payment information would be confidential or that its disclosure would cause competitive harm.

Furthermore, we believe that requiring public disclosure of the information required to be submitted under the statute is supported by the text, structure, and legislative history of Section 13(q). In our view, our exercise of discretion in this manner is consistent with the statute’s use of the term “annual report,” which is typically a publicly filed document, and Congress’s

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<sup>246</sup> Section 13(q)(2)(E).

<sup>247</sup> See, e.g., the EU Directives.

<sup>248</sup> 156 CONG. REC. S5873 (July 15, 2010) (Statement of Senator Cardin); *id.* at S3815 (May 17, 2010) (Statement of Senator Cardin) (describing Congress’s intention to create “a historic transparency standard that will pierce the veil of secrecy that fosters so much corruption and instability in resource-rich countries”).

inclusion of the statute in the Exchange Act, which generally operates through a mechanism of public disclosure.<sup>249</sup> We also observe that Section 13(q) requires issuers to disclose detailed information in a number of categories, marked by electronic data tags, without specifying any particular role for the Commission in using that information or those data tags. We believe that this is a further indication that Congress intended for the information to be made publicly available. In addition, we believe that providing an issuer’s Form SD filings to the public through the searchable, online EDGAR system, which would enable users of the information to produce their own up-to-date compilations in real time, is both consistent with the goals of the statute and the Commission’s obligation, to the extent practicable, to “make available online, to the public, a compilation of the information required to be submitted” by issuers. Finally, neither the statute’s text nor legislative history includes any suggestion that the required payment disclosure should be confidential. In fact, the legislative history supports our view that the information submitted under the statute should be publicly disclosed.<sup>250</sup>

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<sup>249</sup> The Exchange Act is fundamentally a public disclosure statute. See generally *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985) (“the core mechanism” is “sweeping disclosure requirements” that allow “shareholder choice”); *Longman v. Food Lion, Inc.*, 197 F.3d 675, 682 (4th Cir. 1999) (embodies a “philosophy of public disclosure”); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1227 (9th Cir. 1987) (“forc[es] public disclosure of facts”). Accordingly, the reports that public companies are required to submit under the Act—such as the annual report on Form 10-K giving a comprehensive description of a public company’s performance—have always been made public. Adding a new disclosure requirement to the Exchange Act, and doing so for the clear purpose of fostering increased transparency and public awareness, is a strong indication that Congress intended for the disclosed information to be made public.

<sup>250</sup> See, e.g., 156 CONG. REC. S3976 (May 19, 2010) (Statement of Senator Feingold) (“This amendment would require companies listed on U.S. stock exchanges to disclose in their SEC filings extractive payments made to foreign governments for oil, gas, and mining. This information would then be made public, empowering citizens in resource-rich countries in their efforts to combat corruption and hold their governments accountable.”); id. at S5872 (July 15, 2010) (Sen. Cardin) (“This [amendment] will require public disclosure of those payments.”); see also id. at S3649 (May 12, 2010) (proposed “sense of Congress” accompanying amendment that became Section 13(q)) (encouraging the President to “work with foreign governments” to establish their own “domestic requirements that companies under [their jurisdiction] publicly disclose any payments made to a government” for resource extraction) (emphasis added); id. at H5199 (June 29, 2010) (Joint Explanatory Statement of the Committee of Conference) (the amendment “requires public disclosure to

We note that some commenters sought an exemption from public disclosure for circumstances in which an issuer believes that disclosure might jeopardize the safety and security of its employees and operations.<sup>251</sup> Other commenters opposed such an exemption and noted their belief that increased transparency would instead increase safety for employees.<sup>252</sup> Several commenters also supported an exemption from public disclosure for situations where a resource extraction issuer is subject to a contractual confidentiality clause, or when such disclosure would jeopardize competitively sensitive information.<sup>253</sup>

As more fully discussed in the 2012 Adopting Release, we are unpersuaded that these concerns warrant a blanket or per se exemption.<sup>254</sup> We emphasize, however, that existing exemptive authority under Section 12(h) or 36(a) of the Exchange Act provide us with the ability to address, on a case by case basis, any situations where confidential treatment may be warranted based upon the specific facts and circumstances, as discussed below.

In sum, we believe that the purpose of Section 13(q) is best served when public disclosure is provided that enables citizens in resource-rich countries to hold their governments

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the SEC of any payment relating to the commercial development of oil, natural gas, and minerals”) (emphasis added).

<sup>251</sup> See 2012 Adopting Release, n.69 and accompanying text.

<sup>252</sup> See 2012 Adopting Release, n.70 and accompanying text.

<sup>253</sup> See letters from American Exploration and Production Council (Jan. 31, 2011) (“AXPC”); API 1; Chamber of Commerce Institute for 21<sup>st</sup> Century Energy (Mar. 2, 2011) (“Chamber Energy Institute”); Chevron 1; ExxonMobil 1; International Association of Oil and Gas Producers (Jan. 27, 2011) (“IAOGP”); Local Authority Pension Fund Forum (Jan. 31, 2011) (“LAPFF”); NMA 2; Rio Tinto; RDS 2; and United States Council for International Business (Feb. 4, 2011) (“USCIB”).

<sup>254</sup> See, e.g., 2012 Adopting Release at Section II.B. See also letter from OpenOil UG (Oct. 26, 2015) (“OpenOil”).

accountable for the wealth generated by those resources.<sup>255</sup> Permitting issuers to submit payment information confidentially would not support, and in fact could undercut, that statutory purpose.

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40. Should the rules permit an issuer to submit the required payment disclosure on a confidential basis? Why or why not?
41. Should the rules provide an exemption from public disclosure for existing or future agreements that contain confidentiality provisions? Would such an exemption be consistent with the purpose of Section 13(q) or would it frustrate it? Would it be necessary or appropriate in the public interest and consistent with the protection of investors?
42. Are there circumstances in which the disclosure of the required payment information would jeopardize the safety and security of a resource extraction issuer's operations or employees? If so, should the rules provide an exemption for those circumstances?
43. Are there any other circumstances in which we should provide an exemption from the public disclosure requirement? For instance, should we provide an exemption for competitively sensitive information, or when disclosure would cause a resource extraction issuer to breach a contractual obligation?
44. If issuers are permitted to provide certain information on a confidential basis, should such issuers also be required to publicly file certain aggregate information? Should the Commission consider such an approach? What would be the costs and benefits of this approach?

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<sup>255</sup> See 156 CONG. REC. at S3816 (Statement of Senator Lugar).

### 3. Exemption from Compliance

Many commenters supported an exemption from the disclosure requirements when the required payment disclosure is prohibited under the host country's laws.<sup>256</sup> Some commenters stated that the laws of China, Cameroon, Qatar, and Angola would prohibit disclosure required under Section 13(q) and expressed concern that other countries would enact similar laws,<sup>257</sup> although other commenters challenged those statements.<sup>258</sup> Two commenters maintained that the comity principles of international law require the Commission to construe the disclosure requirements of Section 13(q) in a manner that avoids conflicts with foreign law.<sup>259</sup> One commenter suggested that an exemption would be consistent with Executive Order 13609, which directs federal agencies to take certain steps to “reduce, eliminate, or prevent unnecessary differences in [international] regulatory requirements.”<sup>260</sup> Some commenters further suggested that failure to adopt such an exemption could encourage foreign issuers to deregister from the

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<sup>256</sup> See letters from API 1; API (Aug. 11, 2011) (“API 2”); API (May 18, 2012) (“API 5”); AngloGold; Spencer Bachus, Chairman of the U.S. House of Representatives Committee on Financial Services, and Gary Miller, Chairman of the U.S. House of Representatives Subcommittee on International Monetary Policy, Committee on Financial Services (Mar. 4, 2011) (“Chairman Bachus and Chairman Miller”); Barrick Gold; BP 1; Chamber Energy Institute; Chevron 1; Cleary; ExxonMobil 1; ExxonMobil (Mar. 15, 2011) (“ExxonMobil 2”); IAOGP; NMA 2; NYSBA Committee; Nexen; PetroChina; Petrobras; PricewaterhouseCoopers LLP (Mar. 2, 2011) (“PWC”); Rio Tinto; RDS 2; Royal Dutch Shell (May 17, 2011) (“RDS 3”); Royal Dutch Shell (Aug. 1, 2011) (“RDS 4”); Senator Lisa Murkowski and Senator John Cornyn (Feb. 28, 2012) (“Sen. Murkowski and Sen. Cornyn”); Split Rock International, Inc. (Mar. 1, 2011) (“Split Rock”); Statoil; Talisman Energy Inc. (June 23, 2011) (“Talisman”); and Vale S.A. (Mar. 2, 2011) (“Vale”). See also letter from Cravath, Swaine & Moore LLP, Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, Shearman & Sterling LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP, and Wilmer Cutler Pickering Hale and Dorr LLP (Nov. 5, 2010) (“Cravath et al.”).

<sup>257</sup> See letters from API 1 and ExxonMobil 1. See also letter from RDS 2 (mentioning China, Cameroon, and Qatar).

<sup>258</sup> See note 263 below.

<sup>259</sup> See letters from API 5 and NMA 2.

<sup>260</sup> See letter from API 5. We note that the responsibilities of federal agencies under Executive Order 13609 are to be carried out “[t]o the extent permitted by law” and that foreign regulatory approaches are to be considered “to the extent feasible, appropriate, and consistent with law.” See Proclamation No. 13609, 77 Fed. Reg. 26413 (May 4, 2012).

U.S. market<sup>261</sup> and would adversely affect investors, efficiency, competition, and capital formation.<sup>262</sup>

Other commenters opposed an exemption for foreign laws that prohibits disclosure of payment information.<sup>263</sup> Some commenters believed it would undermine the purpose of Section 13(q) and create an incentive for foreign countries that want to prevent transparency to pass such laws, thereby creating a loophole for companies to avoid disclosure.<sup>264</sup> Commenters also disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information.<sup>265</sup> Those commenters noted that most confidentiality laws in the extractive industry sector relate to the confidentiality of geological and other technical data, and

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<sup>261</sup> See letters from Cleary; RDS 1; Split Rock; and Statoil. See also letter from Branden Carl Berns (Dec. 7, 2011) (“Berns”) (maintaining that some foreign issuers subject to Section 13(q) with modest capitalizations on U.S. exchanges might choose to delist in response to competitive advantages enjoyed by issuers not subject to Section 13(q)).

<sup>262</sup> See, e.g., letters from API 1; ExxonMobil 1; and RDS 2. See also letter from API 5. Several commenters noted that we have a statutory duty to consider efficiency, competition, and capital formation when adopting rules. See letter from API (Jan. 19, 2012) (“API 3”); Cravath et al.; Senator Mary L. Landrieu (Mar. 6, 2012) (“Sen. Landrieu”); and Sen. Murkowski and Sen. Cornyn.

<sup>263</sup> See letters from OpenOil; OxFam 2; PWYP 5; PWYP-CAM; Senator Cardin et al. 2; SNS; Reimer; Rep. Waters et al.; The Carter Center (Apr. 21, 2014) (“Carter”).

<sup>264</sup> See, e.g., letters from Allianz 2; Cambodians for Resource Revenue Transparency (Feb. 7, 2012) (“Cambodians”); EG Justice (Feb. 7, 2012) (“EG Justice 2”); FSNPF; Global Witness 1; Global Witness 2; Grupo FARO (Feb. 13, 2012) (“Grupo Faro”); Human Rights Foundation of Monland (Mar. 8, 2011 and July 15, 2011) (respectively, “HURFOM 1” and “HURFOM 2”); National Civil Society Coalition on Mineral Resource Governance of Senegal (Feb. 14, 2012) (“National Coalition of Senegal”); OSISA-A; PWYP 1; Representatives Barney Frank, Jose Serrano, Norman Dicks, Henry Waxman, Maxine Waters, Donald Payne, Nita Lowey, Betty McCollum, Barbara Lee, Jesse Jackson, Jr., Alcee Hastings, Gregory Meeks, Rosa DeLauro, and Marcy Kaptur (Feb. 15, 2012) (“Rep. Frank et al.”); Sen. Cardin et al. 1; Sen. Cardin et al. 2; Sen. Levin 1; George Soros (Feb. 21, 2012) (“Soros”); USAID; and letter from WACAM (Feb. 2, 2012) (“WACAM”). But see letter from API 6 (stating that the Commission’s experience with Rule 1202 of Regulation S-K indicates that similar exemptions do not incentivize foreign governments to pass prohibitions on disclosure).

<sup>265</sup> See, e.g., letters from Calvert 2; ERI 3; Global Witness 1; Global Witness 2; OpenOil; PWYP 1; Publish What You Pay (Dec. 20, 2011) (“PWYP 3”); PWYP 4; and Rep. Frank et al. For a lengthier discussion of previous comments, see Section II.B.2.b of the 2012 Adopting Release.

in any event, most resource extraction agreements contain specific provisions that allow for disclosure when required by law or stock exchange rules.

Given these conflicting positions and representations, and consistent with the EU Directives and ESTMA, we are not proposing an exemption when the required disclosure is prohibited by host country law. Instead, we will consider using our existing authority under the Exchange Act to provide exemptive relief at the request of a resource extraction issuer, if and when warranted.<sup>266</sup> We believe that a case-by-case approach to exemptive relief using our existing authority is preferable to either adopting a blanket exemption for a foreign law prohibition (or for any other reason) or providing no exemptions and no avenue for exemptive relief under this or other circumstances. Among other things, such an approach would permit us to tailor the exemptive relief to the particular facts and circumstances presented, such as by permitting alternative disclosure or by phasing out the exemption over an appropriate period of time.<sup>267</sup>

This approach would allow us to determine if and when exemptive relief may be warranted based on the issuer's specific facts and circumstances.<sup>268</sup> For example, an issuer claiming that a foreign law prohibits the required payment disclosure under Section 13(q) would be able to make its case, based on its own particular circumstances, that it would suffer substantial commercial or financial harm if relief is not granted. Issuers seeking an exemption

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<sup>266</sup> See Sections 12(h) and 36(a) of the Exchange Act (15 U.S.C. 78l(h) and 78mm(a)).

<sup>267</sup> For example, if a resource extraction issuer were operating in a country that enacted a law that prohibited the detailed public disclosures required under our proposal, the Commission could potentially issue a limited exemptive order (in substance and/or duration). The order could be tailored to either require some form of disclosure that would not conflict with the host country's law and/or provide the issuer with time to address the factors resulting in non-compliance.

<sup>268</sup> See letters from Oxfam 2 and PWYP 4 (each supporting a case by case exemption).

would be required to submit a written request for exemptive relief to the Commission, describing the particular payment disclosures it seeks to omit (e.g., signature bonuses in Country X or production entitlement payments in Country Y) and the specific facts and circumstances that warrant an exemption, including the particular costs and burdens it faces if it discloses the information. The Commission would be able to consider all appropriate factors in making a determination whether to grant requests, including, for example, any legal analysis necessary to support the issuer's request,<sup>269</sup> whether the disclosure is already publicly available, and whether (and how frequently) similar information has been disclosed by other companies, under the same or similar circumstances.<sup>270</sup> If an issuer is already making the disclosures under another regulatory disclosure regime, we anticipate that the applicant would have a heavy burden to demonstrate that an exemption is necessary from the reporting required by our proposed rules.<sup>271</sup>

### **Request for Comment**

45. As noted above, we will consider using our existing exemptive authority, where appropriate, to exempt issuers from the resource payment disclosure requirements. This could include, for example, situations where host country laws prohibit the disclosure called for by the rules. Is a case-by-case exemptive process a better alternative than providing a rule-based blanket exemption for specific countries or other circumstances, or providing no exemptions?

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<sup>269</sup> For example, we would expect an opinion of counsel in support of any claim that a foreign law prohibits the disclosure of the information in question.

<sup>270</sup> See PWYP 4 (recommending criteria to consider in granting exemptions).

<sup>271</sup> The Commission would generally expect to provide public notice of the exemptive request and an opportunity for public comment.

46. What are the advantages and disadvantages, if any, of relying on our existing exemptive authority under the Exchange Act?
47. Do any foreign laws prohibit the disclosure that would be required by the proposed rules? Is there any information that has not been previously provided by commenters to support an assertion that such prohibitions exist and are not limited in application? If so, please provide such information and identify the specific law and the corresponding country.
48. We note that the EU Directives and ESTMA do not provide an exemption for situations when disclosure is prohibited under host country law. Has this presented any problems for resource extraction issuers subject to these reporting regimes? If so, please identify specific problems that have arisen and explain how companies are managing those situations.

#### **4. Alternative Reporting**

As noted above, several countries have implemented resource extraction payment disclosure laws since the 2012 Rules.<sup>272</sup> We also note that in 2014, the United States became an EITI candidate country. In light of these developments and with a view towards reducing compliance costs, we are proposing a provision that would allow issuers to meet the requirements of the proposed rules, in certain circumstances, by providing disclosures that comply with a foreign jurisdiction's rules or that meet the USEITI reporting requirements, if the Commission has determined that those rules or requirements are substantially similar to the rules adopted under Section 13(q).<sup>273</sup>

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<sup>272</sup> See Section I above.

<sup>273</sup> Proposed Item 2.01(b) of Form SD. See also letters from Chevron (May 7, 2014) ("Chevron 2") and Exxon & Royal Dutch Shell (May 1, 2014) ("Exxon") (supporting substituted compliance provisions).

More specifically, the proposed provision would allow, in certain circumstances, issuers subject to resource extraction payment disclosure requirements in a foreign jurisdiction to file the report it prepared under those foreign requirements in lieu of the report that would otherwise be required by our disclosure rules. The proposed rules would permit compliance under this framework only after the Commission has determined that the foreign disclosure requirements are substantially similar to the requirements in its rules.<sup>274</sup> We note that the Commission has, in other circumstances, recognized that steps taken to satisfy foreign regulatory requirements could, in certain circumstances, also satisfy U.S. regulatory obligations.<sup>275</sup>

The alternative reporting provision would also be extended, to the extent appropriate,<sup>276</sup> to reports submitted in full compliance with the USEITI reporting standards, provided that the Commission has determined that the disclosures required thereunder are substantially similar to the final rules under Section 13(q).

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<sup>274</sup> In this regard, we could rely on Rule 0-13 [17 CFR 240.0-13] which permits an application to be filed with the Commission to request a “substituted compliance order” under the Exchange Act. Pursuant to Rule 0-13, the application must include supporting documents and will be referred to the Commission’s staff for review. The Commission must publish a notice in the Federal Register that a complete application has been submitted and allow for public comment. The Commission may also, in its sole discretion, schedule a hearing on the matter addressed by the application.

<sup>275</sup> See, e.g., the Commission’s recently adopted rules on cross-border security-based swaps, which allow for substituted compliance when market participants are subject to comparable regulations in other jurisdictions. Release No. 34-75611 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015) (Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants); Release No. 34-74244 (Feb. 11, 2015), 80 FR 14563 (Mar. 19, 2015) (Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information); and Release No. 34-72472 (June 25, 2014), 79 FR 47277 (Aug. 12, 2014) (Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities).

<sup>276</sup> The USEITI only requires disclosure of payments made to the U.S. federal government. As such, any future determination that the USEITI reporting standards are “substantially similar” to the requirements of the proposed rules could only apply to the disclosures required by the proposed rules concerning payments made by resource extraction issuers to the Federal Government. In these circumstances, an extraction issuer that made payments to a foreign government would still need to report those payments in accordance with Form SD and could not rely on its USEITI reports to satisfy this component of its Rule 13q-1 reporting obligation.

This framework for alternative reporting would allow a resource extraction issuer to avoid the costs of having to prepare a separate report meeting the requirements of our proposed disclosure rules when it already files a substantially similar report in another jurisdiction or under USEITI. Adoption of such a provision would also be consistent with the approach taken in the EU Directives and ESTMA.<sup>277</sup> In addition, we believe that adoption of such a provision would promote international transparency efforts by providing an incentive to a foreign country that is considering adoption of resource extraction payment disclosure laws to provide a level of disclosure that is consistent with our rules.

We are proposing to require resource extraction issuers to file the substantially similar report as an exhibit to Form SD. A resource extraction issuer would also be required to state in the body of its Form SD filing that it is relying on our accommodation and identify the alternative reporting regime for which the report was prepared (e.g., a foreign jurisdiction or the USEITI).

We anticipate that we would make determinations about the similarity of a foreign jurisdiction's disclosure requirements either unilaterally or pursuant to an application submitted by an issuer or a jurisdiction. We anticipate following the same process in determining whether USEITI disclosures are substantially similar. We would then publish the determinations in the form of a Commission order. We would consider, among others, the following criteria in making a determination whether USEITI or a foreign jurisdiction's reporting requirements are substantially similar to ours: (1) the types of activities that trigger disclosure; (2) the types of

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<sup>277</sup> As we noted in Section I above, Canada's Minister of Natural Resources has already determined that the EU Directives are equivalent to Canada's requirements. Extractive Sector Transparency Measures Act – Substitution Determination, available at <http://www.nrcan.gc.ca/acts-regulations/17754> (last visited Dec. 8, 2015).

payments that are required to be disclosed; (3) whether project-level disclosure is required and, if so, the definition of “project;” (4) whether the disclosure must be publicly filed and whether it includes the identity of the issuer; and (5) whether the disclosure must be provided using an interactive data format that includes electronic tags. When considering whether to allow substituted reporting based on a foreign jurisdiction’s reporting requirements, we would also consider whether disclosure of payments to subnational governments is required and whether there are any exemptions allowed and, if so, whether there are any conditions that would limit the grant or scope of the exemptions.

### **Request for Comment**

49. Should we include a provision in the rules that would allow for issuers subject to reporting requirements in certain foreign jurisdictions or under the USEITI to submit those reports in satisfaction of our requirements? Why or why not? If so, what criteria should we apply when making a determination that the alternative disclosure requirements are substantially similar to the disclosure requirements under Rule 13q-1? Are there additional criteria, other than those identified above, that we should apply in making such a determination? Are there criteria identified above that we should not apply? Should we align our criteria with criteria used in foreign jurisdictions, such as the EU Directives?
50. We propose to base our determination on a finding that the foreign jurisdiction’s or the USEITI’s requirements are substantially similar to our own. Is this the standard we should use? Should we consider other standards, for example, a determination that a foreign jurisdiction’s or the USEITI’s requirements are “equivalent” or “comparable?”

51. Given the specificity of the disclosures required, should we consider a stricter or more flexible standard? Are there other standards for determining when reliance on foreign or USEITI requirements is appropriate that we should consider? If so, please describe the standard and why it should be used.
52. In making the determination that a foreign jurisdiction's or the EITI's disclosure requirements are substantially similar to our own, should we make the determination unilaterally on our own initiative, require an issuer to submit an application prior to making the determinations, allow jurisdictions to submit an application, or allow all of these methods? If we should require an application, what supporting evidence should we require? For example, should we require a legal opinion that the disclosure requirements are substantially similar?
53. Under Exchange Act Rule 0-13, we could consider requests for substituted compliance upon application by an applicant or the jurisdiction itself and after notice and an opportunity for public comment.<sup>278</sup> Does Rule 0-13 provide an appropriate structure for the Commission to make decisions regarding the similarity of resource extraction payment disclosure requirements in foreign jurisdictions or under the USEITI's reporting regime for purposes of Rule 13q-1?
54. Is there another process for the Commission to use to consider substituted compliance requests other than the Rule 0-13 process? For example, should the Commission use the process set forth in Rule 0-12? Should the Commission permit someone other than a

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<sup>278</sup> See note 274 above.

resource extraction issuer or a foreign or domestic authority to submit an application for substituted compliance?

55. As noted above, in making a determination about the similarity of a foreign jurisdiction's disclosure requirement, the Commission would consider, among other things, whether the disclosure must be provided using an interactive data format that includes electronic tags. If a foreign jurisdiction requires an interactive data format other than XBRL, but otherwise calls for disclosure substantially similar to our own, should we nonetheless require resource extraction issuers to file these disclosures in XBRL? Would having the payment data tagged using different interactive formats adversely affect the ability of users to compile and analyze the data? In these circumstances, are there other alternatives we should consider?
56. Given the progress in the development of resource extraction payment disclosure rules in certain jurisdictions, should we consider making a determination regarding the similarity of certain foreign reporting requirements when the final rule is adopted? Currently, payment disclosure rules are in place in the United Kingdom, Norway, and Canada. Should we determine whether rules in all of these jurisdictions are substantially similar for purposes of the final rule? Are there other jurisdictions that also have payment disclosure rules in place that we should consider for purposes of compliance with Rule 13q-1?
57. The USEITI reporting framework only requires disclosure of payments made to the U.S. federal government while the proposed rules would require disclosure of payments to foreign governments and the Federal Government. Thus, as proposed, if the Commission

were to find that the USEITI reporting standards are “substantially similar” to the requirements of the proposed rules, the Commission would permit issuers to file reports submitted in full compliance with the USEITI in lieu of the disclosure required by the proposed rules concerning payments made by resource extraction issuers to the Federal Government. In these circumstances, any payments made to foreign governments would still need to be reported in accordance with Form SD. In light of the reporting differences between the USEITI and our proposed rules, however, should the Commission preclude the use of USEITI reports under the alternative reporting provision when a resource extraction issuer would also have to disclose payments made to foreign governments pursuant to the proposed rules?

## **5. Exhibits and Interactive Data Format Requirements**

We are proposing requirements for the presentation of the mandated payment information similar to those set forth in the 2012 Rules. The proposed rules would require a resource extraction issuer to file the required disclosure on EDGAR in an XBRL exhibit to Form SD. Providing the required disclosure elements in a machine readable (electronically-tagged) format would enable users easily to extract, aggregate, and analyze the information in a manner that is most useful to them. For example, it would allow the information received from the issuers to be converted by EDGAR and other commonly used software and services into an easily-readable tabular format.<sup>279</sup>

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<sup>279</sup> Another possible alternative for providing the information in interactive data format would be Inline XBRL. Commission rules and the EDGAR system do not currently allow for the use of Inline XBRL. To the extent that a determination is made in the future to accept Inline XBRL submissions, we expect to revisit the format in which this disclosure requirement is provided.

Section 13(q) requires the submission of certain information in interactive data format.<sup>280</sup>

Under the proposed rules, consistent with the 2012 Rules and the statutory language, a resource extraction issuer would be required to submit the payment information in XBRL using electronic tags—a taxonomy of defined reporting elements—that identify, for any payment required to be disclosed:

- the total amounts of the payments, by category;<sup>281</sup>
- the currency used to make the payments;
- the financial period in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- the government that received the payments, and the country in which the government is located; and
- the project of the resource extraction issuer to which the payments relate.<sup>282</sup>

In addition to the electronic tags specifically required by the statute, a resource extraction issuer would also be required to provide and tag the type and total amount of payments made for each project and the type and total amount of payments for all projects made to each government.

These additional tags relate to information that is specifically required to be included in the resource extraction issuer's annual report by Section 13(q).<sup>283</sup> Unlike the 2012 Rules, however, which included those additional tags, the proposed rules would also require resource extraction

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<sup>280</sup> 15 U.S.C. 78m(q)(2)(C) and 15 U.S.C. 78m(q)(2)(D)(ii). The Commission has defined an “interactive data file” to be the interactive data submitted in a machine-readable format. See 17 CFR 232.11; Release No. 33-9002 (Jan. 14, 2009), 74 FR 6776, 6778 n.50 (Feb. 10, 2009).

<sup>281</sup> For example, categories of payments could be bonuses, taxes, or fees.

<sup>282</sup> See proposed Item 2.01(a) of Form SD.

<sup>283</sup> See Section 13(q)(2)(A)(i)-(ii).

issuers to tag the particular resource that is the subject of commercial development, and the subnational geographic location of the project.<sup>284</sup> We believe that these additional tags would further enhance the usefulness of the data with an insignificant corresponding increase in compliance costs.<sup>285</sup>

For purposes of identifying the subnational geographic location of the project, an instruction to the disclosure item would specify that issuers must provide information regarding the location of the project that is sufficiently detailed to permit a reasonable user of the information to identify the project's specific, subnational location.<sup>286</sup> Depending on the facts and circumstances, this could include the name of the subnational governmental jurisdiction(s) (e.g., state, province, county, district, municipality, territory, etc.) or the commonly recognized subnational geographic or geologic location (e.g., oil field, basin, canyon, delta, desert, mountain, etc.) where the project is located, or both. We anticipate that more than one descriptive term would likely be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized, subnational geographic location. In considering the appropriate level of detail, issuers may need to consider how the relevant contract identifies the location of the project.<sup>287</sup>

In proposing to require the use of XBRL as the interactive data format, we note that a number of the commenters who addressed the issue prior to the 2012 Rules supported the use of

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<sup>284</sup> API has similarly suggested requiring electronic tags for the type of resource and governmental payee. See letter from API 6.

<sup>285</sup> See proposed Item 2.01(a)(9)-(10) of Form SD.

<sup>286</sup> See proposed Instruction 3 to Item 2.01 of Form SD.

<sup>287</sup> See id.

XBRL.<sup>288</sup> While some commenters suggested allowing the flexibility to use an interactive data format of their preference,<sup>289</sup> that approach could reduce the comparability of the information and make it more difficult for interested parties to track payments made to a particular government or project.

Consistent with the statute, the proposed rules would require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. The statute also requires a resource extraction issuer to present the type and total amount of payments made for each project and to each government, but does not specify how the issuer should report the total amounts. Although some commenters suggested requiring the reporting of payments only in the currency in which they were made,<sup>290</sup> we believe that the statutory requirement to provide a tag identifying the currency used to make the payment coupled with the requirement to disclose the total amount of payments by payment type for each project and to each government requires issuers to perform currency conversion when payments are made in multiple currencies.

We are proposing an instruction to Form SD clarifying that issuers would have to report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government in U.S. dollars or in the issuer's reporting currency if not U.S. dollars.<sup>291</sup> We understand issuers' concerns regarding the compliance costs relating to

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<sup>288</sup> See letters from API 1; Anadarko Petroleum Corporation (Mar. 2, 2011) (“Anadarko”); AngloGold; BP 1; California Public Employees Retirement System (Feb. 28, 2011) (“CalPERS”); ExxonMobil 1; PWYP 1; and RDS 2. See also 2012 Adopting Release, n.410 and accompanying text.

<sup>289</sup> See letters from Barrick Gold and NMA 2. See also 2012 Adopting Release, n.413 and accompanying text.

<sup>290</sup> See letters from NMA 2 and PWYP 1. See also 2012 Adopting Release, n.421 and accompanying text.

<sup>291</sup> See proposed Instruction 2 to Item 2.01 of Form SD. Currently, foreign private issuers may present their financial statements in a currency other than U.S. dollars for purposes of Securities Act registration and Exchange Act registration and reporting. See Rule 3-20 of Regulation S-X [17 CFR 210.3-20].

making payments in multiple currencies and being required to report the information in another currency.<sup>292</sup> A resource extraction issuer would be able to choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways: (1) by translating the expenses at the exchange rate existing at the time the payment is made; (2) by using a weighted average of the exchange rates during the period; or (3) based on the exchange rate as of the issuer's fiscal year end.<sup>293</sup> A resource extraction issuer would have to disclose the method used to calculate the currency conversion.<sup>294</sup>

Consistent with Section 13(q) and the 2012 Rules, the proposed rules would not require the resource extraction payment information to be audited or provided on an accrual basis. We note that, in this regard, the EITI approach is different from Section 13(q). Under the EITI, companies and the host country's government generally each submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, frequently an independent auditor, who reconciles the information provided by the companies and the government, and then the administrator produces a report.<sup>295</sup> In contrast, Section 13(q) requires us to issue rules for disclosure of payments by resource extraction issuers; it does not contemplate that an administrator would audit and reconcile the information, or produce a report

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<sup>292</sup> See, e.g., letters from API 1; BP 1; ExxonMobil 1; NMA 2; and RDS 2. We note that the EITI recommends that oil and natural gas participants report in U.S. dollars, as the quoted market price of these resources is in U.S. dollars. It also recommends that mining companies be permitted to use the local currency because most benefit streams for those companies are paid in the local currency. The EITI also suggests that companies may decide to report in both U.S. dollars and the local currency. See the EITI Handbook, at 30.

<sup>293</sup> See proposed Instruction 2 to Item 2.01 of Form SD.

<sup>294</sup> See id.

<sup>295</sup> See EITI Standard, at 30-31.

as a result of the audit and reconciliation. Moreover, while Section 13(q) refers to “payments,” it does not require the information to be included in the financial statements.<sup>296</sup> In addition, we recognize the concerns raised by some commenters that an auditing requirement for the payment information would significantly increase implementation and ongoing reporting costs.<sup>297</sup>

Consistent with the statute and the 2012 Rules, the proposed rules would require a resource extraction issuer to include an electronic tag that identifies the business segment of the resource extraction issuer that made the payments. As suggested by commenters,<sup>298</sup> we are proposing to define “business segment” as a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.<sup>299</sup> Defining “business segment” in this way would enable issuers to report the information according to how they currently report their business operations, which should help to reduce compliance costs.

We note that some of the electronic tags, such as those pertaining to category, currency, country, and financial period would have fixed definitions and would enable interested persons to evaluate and compare the payment information across companies and governments. Other tags, such as those pertaining to business segment, government, and project, would be customizable to allow issuers to enter information specific to their business. To the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, issuers could omit certain tags that may be inapplicable (e.g., project tag, business

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<sup>296</sup> See 2012 Adopting Release, n.405 and accompanying text.

<sup>297</sup> See, e.g., letters from Anadarko, AngloGold, API 1, BP 1, Chevron 1, Ernst & Young (Jan. 31, 2011), ExxonMobil 1, NYSBA Committee, Petrobras, and PWC.

<sup>298</sup> See 2012 Adopting Release, n.426 and accompanying text.

<sup>299</sup> See proposed Item 2.01(c)(1) of Form SD. The term “reportable segment” is defined in FASB ASC Topic 280, Segment Reporting, and IFRS 8, Operating Segments.

segment tag) for those payment types as long as they provide all other electronic tags, including the tag identifying the recipient government.<sup>300</sup>

Finally, we note that Section 13(q)(3) directs the Commission, to the extent practicable, to provide a compilation of the disclosure made by resource extraction issuers. The proposed rules would require that the disclosures only be made available on EDGAR in an XBRL exhibit. The Commission does not anticipate making an additional or different compilation of information available to the public. Information provided on Form SD using the XBRL standard can be electronically searched and extracted and therefore, in our view, would function as an effective and efficient compilation for public use by allowing data users to create their own compilations and analyses. Moreover, the functionality provided by EDGAR would allow a user to create an up-to-date compilation in real time (rather than looking to a potentially dated, periodically released Commission compilation) and to create a compilation that is tailored to the specific parameters that the user may direct EDGAR to compile.<sup>301</sup>

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<sup>300</sup> See 2012 Adopting Release, n.432 and accompanying text.

<sup>301</sup> Our review of the legislative history leading up to the adoption of Section 13(q) persuades us that the public compilation requirement was not intended to be a substitute for the public disclosure of an issuer’s annual reports. Rather, the public compilation requirement, added to an earlier version of the legislation that became Section 13(q), was intended for the convenience of the users of that data—many of whom were not seeking the information for purposes of investment activity and thus would potentially be unfamiliar with locating information in the extensive annual reports that issuers file. In the earlier versions of the draft legislation, the resource extraction payment disclosures were required to be made in the annual report that each issuer was already required to file under the securities laws. See, e.g., Extractive Industries Transparency Disclosure Bill (H.R. 6066) (May 2008) (“requir[ing] that each issuer required [to] file an annual report with the Commission shall disclose in such report” the resource extraction payments that the issuer makes) (emphasis added). For the convenience of non-investor users of the data, the provision included a separate section entitled “Public Availability of Information” that provided in pertinent part: “The Securities and Exchange Commission shall, by rule or regulation, provide that the information filed by all issuers . . . be compiled so that it is accessible by the public directly, and in a compiled format, from the website of the Commission without separately accessing . . . the annual reports of each issuer filing such information.” Id. (emphasis added). As the proposed legislative language was later being incorporated into the Act, the Commission’s staff gave technical advice that led to the modification of the legislative text to provide the Commission with additional flexibility to permit the disclosures in an annual report other than “the annual report” that issuers already file so as to avoid

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58. Should we require a resource extraction issuer to present some or all of the required payment information in the body of the annual report on Form SD instead of, or in addition to, presenting the information in the exhibits? If we should require disclosure of some or all the payment information in the body of the annual report, please explain what information should be required and why. For example, should we require a resource extraction issuer to provide a summary of the payment information in the body of the annual report? If so, what items of information should be disclosed in the summary?
59. How should the total amount of payments be reported when payments are made in multiple currencies? Do the three proposed methods for calculating the currency conversion described above provide issuers with sufficient options to address any possible concerns about compliance costs, the comparability of the disclosure among issuers, or other factors? Why or why not?
60. Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? Is XBRL the most suitable interactive data standard for purposes of this rule?
61. Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the issuer's business segment that made the payments. Should we define

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unnecessarily burdening issuers. See 156 CONG. REC. 3815 (May 17, 2010 (Statement of Senator Cardin)) (“We have been working with a lot of groups on perfecting this amendment, and we have made some changes that will give the SEC the utmost flexibility in defining how these reports will be made so that we not get the transparency we need without burdening the companies.”). Our decision to propose a Form SD rather than to require the disclosures in an issuer's annual report, when coupled with the functionality that the EDGAR system provides, in our view sufficiently addresses the Congressional concern that originally led to the separate requirement of a publicly available compilation.

“business segment” differently than we have proposed? If so, what definition should we use?

62. As proposed, should we require resource extraction issuers to tag the particular resource that is the subject of commercial development and the subnational geographic location of the project? Why or why not? Would these additional tags further enhance the usefulness of the data without significantly increasing compliance costs?
63. As we have noted, we believe that it is important that the project-level disclosures enable local communities to identify the revenue streams associated with particular extractive projects. When combined with the other tagged information, would our proposed approach to describing the geographic location of the project provide sufficient detail to users of the disclosure? Would users be able to identify the location of the project and distinguish that project from other projects in the same area? Would allowing resource extraction issuers flexibility in describing the location of their projects reduce comparability and the usefulness of the disclosure? Should we prescribe a different method for describing the location of a project? If so, what should that method be?
64. Proposed Instruction 3 to Item 2.01 states that the “geographic location of the project” must be sufficiently detailed to permit a “reasonable user of the information” to identify specific, subnational geographic locations. Should we provide more guidance as to what is a sufficient level of detail or how such instruction should be applied?
65. Is there additional or other information that should be required to be electronically tagged to make the disclosure more useful to local communities and other users of the information? If so, what additional information should be required and why?

66. Section 13(q)(3) directs the Commission, to the extent practicable, to provide a compilation of the disclosure made by resource extraction issuers. We believe that we satisfy the statutory requirement by making each resource extraction issuer's disclosures available on EDGAR in XBRL format. Is a different compilation necessary? If so, what information should this compilation include and how often should it be provided? Should a compilation be provided on a calendar year basis, or would some other time period be more appropriate?

## **6. Treatment for Purposes of Securities Act and Exchange Act**

Consistent with the 2012 Rules, the proposed rules would require resource extraction issuers to file the payment information on Form SD. Commenters on the 2010 Proposing Release had divergent views as to whether the required information should be furnished or filed,<sup>302</sup> and Section 13(q) does not state how the information should be submitted. In reaching the conclusion that the information should be "filed" instead of "furnished," the Commission noted that the statute defines "resource extraction issuer" in part to mean an issuer that is required to file an annual report with the Commission,<sup>303</sup> which, as commenters have stated,

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<sup>302</sup> Compare letters from API 1; AngloGold; Barrick Gold; BP 1; Cleary; ExxonMobil 1; NMA 2; NYSBA Committee; PetroChina; PWC; and RDS 2 (supporting a requirement to furnish the disclosure) with letters from Bon Secours Health System (Mar. 1, 2011) ("Bon Secours"); Calvert 1; Earthworks; Extractive Industries Working Group (Mar. 2, 2011) ("EIWG"); ERI 1; EarthRights International (Sept. 20, 2011) ("ERI 2"); Global Financial Integrity (Mar. 1, 2011) ("Global Financial 2"); Global Witness 1; Harrington Investments, Inc. (Jan. 19, 2011) ("HII"); HURFOM 1; HURFOM 2; Newground Social Investment (Mar. 1, 2011) ("Newground"); ONE; Oxfam 1; PGGM Investments (Mar. 1, 2011) ("PGGM"); PWYP 1; RWI 1; Peter Sanborn (Mar. 12, 2011) ("Sanborn"); Sen. Cardin et al. 1; Sen. Cardin et al. 2; Sen. Levin 1; Soros; TIAA-CREF (March 2, 2011) ("TIAA"); USAID; United Steelworkers (Mar. 29, 2011) ("USW"); and WRI (supporting a requirement to file the disclosure).

<sup>303</sup> 15 U.S.C. 78m(q)(1)(D)(i).

suggests that the annual report that includes the required payment information should be filed.<sup>304</sup> We believe the same logic still applies.

Additionally, many commenters on the 2010 Proposing Release believed that investors would benefit from the payment information being “filed” and subject to Exchange Act Section 18 liability.<sup>305</sup> Some commenters asserted that allowing the information to be furnished would diminish the importance of the information.<sup>306</sup> Some commenters believed that requiring the information to be filed would enhance the quality of the disclosure.<sup>307</sup> In addition, some commenters argued that the information required by Section 13(q) differs from the information that the Commission typically permits issuers to furnish and that the information is qualitatively similar to disclosures that are required to be filed under Exchange Act Section 13.<sup>308</sup>

Some commenters argued that the disclosure should be furnished because the information is not material to investors.<sup>309</sup> Others, including some investors, stated that the information is material.<sup>310</sup> Given this disagreement, and that materiality is a fact specific inquiry, we are not persuaded that this is a reason to provide that the information should be furnished. After considering the comments and the statutory language, we continue to believe that the information

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<sup>304</sup> See letters from Global Witness 1; PWYP 1; and Sen. Cardin et al 1.

<sup>305</sup> See letters from Bon Secours; Calvert 1; CRS; Earthworks; EIWG; ERI 1; ERI 2; Global Financial 2; Global Witness 1; Greenpeace (Mar. 8, 2012) (“Greenpeace”); HII; HURFOM 1; HURFOM 2; Newground; ONE; Oxfam 1; PGGM; PWYP 1; RWI 1; Sanborn; Sen. Cardin et al. 1; Sen. Cardin et al. 2; Sen. Levin 1; Soros; TIAA; USAID; USW; and WRI.

<sup>306</sup> See letters from Calvert 1 and Global Witness 1.

<sup>307</sup> See letters from HURFOM 1; Global Witness 1; and PWYP 1.

<sup>308</sup> See letters from ERI 1; HII; Oxfam 1; PGGM; PWYP 1; Sen. Cardin et al. 1; and Soros.

<sup>309</sup> See letters from API 1; ExxonMobil 1; and RDS 2. See also letter from AngloGold.

<sup>310</sup> See, e.g., letters from Calvert 1; ERI 1; Soros; Global Financial Integrity (Jan. 28, 2011) (“Global Financial 1”); Global Witness 1; HII; Oxfam 1; Sanborn; PGGM; PWYP 1; Sen. Cardin et al. 1; and TIAA.

should be required to be filed. We note that Section 18 does not create strict liability for filed information. Rather, it states that a person shall not be liable for misleading statements in a filed document if such person can establish that he or she acted in good faith and had no knowledge that the statement was false or misleading.<sup>311</sup> As noted above, although we are proposing that the information would be filed, because the disclosure would be in a new form, rather than in issuers' Exchange Act annual reports, the filed disclosure would not be subject to the officer certifications required by Rules 13a-14 and 15d-14 under the Exchange Act.

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67. Should we, as proposed, require the resource extraction payment disclosure to be filed, rather than furnished? If not, why not? Are there compelling reasons why the disclosures should not be subject to Section 18 liability?

68. Should we require that certain officers, such as the resource extraction issuer's principal executive officer, principal financial officer, or principal accounting officer, certify the Form SD filing's compliance with the requirements of Section 13(q) of the Exchange Act

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<sup>311</sup> Exchange Act Section 18(a) provides: "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant." A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including reliance and damages. In addition, we note that issuers that fail to comply with the proposed rules could also be violating Exchange Act Sections 13(a) and (q) and 15(d), as applicable. Issuers also would be subject to potential liability under Exchange Act Section 10(b) [15 U.S.C. 78j] and Rule 10b-5 [17 CFR 240.10b-5], promulgated thereunder, for any false or misleading material statements in the information disclosed pursuant to the rule.

or that the filing fairly presents the information required to be disclosed under Rule 13q-1? Are there any other certifications we should require officers of resource extraction issuers to make?

#### **H. Effective Date**

Section 13(q) provides that, with respect to each resource extraction issuer, the final rules issued under that section shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the issuer's fiscal year that ends not earlier than one year after the date on which the Commission issues the final rules under Section 13(q).<sup>312</sup> Similar to the approach in the 2012 Rules, we are proposing that resource extraction issuers would be required to comply with Rule 13q-1 and Form SD for fiscal years ending no earlier than one year after the effective date of the adopted rules.<sup>313</sup> Also, as with the 2012 Rules, we intend to select a specific compliance date that corresponds to the end of the nearest calendar quarter, such as March 31, June 30, September 30, or December 31.<sup>314</sup> For example, if June 17, 2017 was one year after the effective date of the rules, a resource extraction issuer with a fiscal year end of June 30, 2017 (our selected compliance date) or later would be required to file its first resource extraction payment report no later than 150 days after its fiscal year end.

Upon adoption, if any provision of these proposed rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

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<sup>312</sup> 15 U.S.C. 78m(q)(2)(F).

<sup>313</sup> Adopted rules typically go into effect 60 days after they are published in the Federal Register.

<sup>314</sup> See 2012 Adopting Release at 2 [77 FR 56365].

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69. Should we provide a compliance date linked to the end of the nearest commonly used quarterly period following the effective date, as proposed? Should we adopt a shorter or longer transition period?

70. Should our rules provide for a longer transition period for certain categories of resource extraction issuers, such as smaller reporting companies or emerging growth companies? Should the rules provide for a longer transition period for smaller reporting companies or emerging growth companies to allow for data to be collected on the impact the EU Directives or ESTMA would have on companies of similar size? Why or why not?

### **I. General Request for Comment**

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release, particularly any developments since the rules adopted in 2012 were vacated.

We request comment on whether we have properly identified the objectives of Section 13(q) and the governmental interests that the statute and our rules are designed to advance. We also are interested in comments that provide evidence of whether public disclosure (particularly company specific, project-level, public disclosure) supports the commitment of the

Federal Government to international transparency promotion efforts, helps to combat corruption, or promotes governmental accountability.<sup>315</sup>

We request comment from the point of view of companies, investors, other market participants, and civil society actors. We also request comment from the U.S. Department of State, the U.S. Agency for International Development, the U.S. Department of the Interior and any other relevant department or agency on the implications of this rulemaking for international transparency promotion efforts. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

### **III. ECONOMIC ANALYSIS**

#### **A. Introduction and Baseline**

As discussed in detail above, we are proposing Rule 13q-1 and an amendment to Form SD to implement Section 13(q), which was added to the Exchange Act by Section 1504 of the Act. Section 13(q) directs the Commission to issue rules that require a resource extraction issuer to disclose in an annual report filed with the Commission certain information relating to payments made by the issuer (including a subsidiary of the issuer or an entity under the issuer's control) to a foreign government or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. The proposed rule and form amendments implement Section 13(q).

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<sup>315</sup> Some commenters have also expressed the view that this information is important to investors. See, e.g., note 310 above and accompanying text.

As discussed above, Congress intended that the rules issued pursuant to Section 13(q) would help advance the important U.S. foreign policy objective of combatting global corruption and, in so doing, to potentially improve accountability and governance in resource-rich countries around the world.<sup>316</sup> The statute seeks to achieve this objective by mandating a new disclosure provision under the Exchange Act that requires resource extraction issuers to identify and report payments they make to governments relating to the commercial development of oil, natural gas, or minerals. While these objectives and benefits differ from the investor protection benefits that our rules typically strive to achieve, investors and other market participants, as well as civil society in countries that are resource-rich, may benefit from any increased economic and political stability and improved investment climate that such transparency promotes.<sup>317</sup> In addition, some commenters stated that the information disclosed pursuant to Section 13(q) would benefit investors by, among other things, helping them model project cash flows and assess political risk, acquisition costs, and management effectiveness.<sup>318</sup>

We are sensitive to the costs and benefits of the proposed rules, and Exchange Act Section 23(a)(2) requires us, when adopting rules, to consider the impact that any new rule would have on competition. In addition, Section 3(f) of the Exchange Act directs us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary

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<sup>316</sup> See Section I.E.

<sup>317</sup> See also 156 CONG. REC. S5873 (2010) (Statement from Senator Cardin) (“Transparency helps create more stable governments, which in turn allows U.S. companies to operate more freely – and on a level playing field – in markets that are otherwise too risky or unstable.”); and 156 CONG. REC. S3816 (May 17, 2010) (Statement of Senator Lugar) (“Transparency empowers citizens, investors, regulators, and other watchdogs and is a necessary ingredient of good governance for countries and companies alike. . . . Transparency also will benefit Americans at home. Improved governance of extractive industries will improve investment climates for our companies abroad, it will increase the reliability of commodity supplies upon which businesses and people in the United States rely, and it will promote greater energy security.”)

<sup>318</sup> See, e.g., letters from Calvert 1; CalPERS; and Soros.

or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We have considered the costs and benefits that would result from the proposed rule and form amendments, as well as the potential effects on efficiency, competition, and capital formation. Many of the potential economic effects of the proposed rules would stem from the statutory mandate, while others would be a result of the discretion we are proposing to exercise in implementing the Congressional mandate. The discussion below addresses the costs and benefits that might result from both the statute and our proposed discretionary choices, and the comments we received about these matters.<sup>319</sup> In addition, as discussed elsewhere in this release, we recognize that the proposed rule could impose a burden on competition, but we believe that any such burden that might result would be necessary in furtherance of the purposes of Exchange Act Section 13(q).

As part of our analysis, we have quantified the potential economic effects wherever possible. Given both the nature of the statute's intended benefits and the lack of data regarding the benefits and the costs, in some cases we have been unable to provide a quantified estimate. Nevertheless, as described more fully below, we provide both a qualitative assessment of the potential effects and a quantified estimate of the potential aggregate initial and aggregate ongoing compliance costs. We reach our estimates by carefully considering comments we previously received on potential costs and taking into account additional data and information, including recent global developments in connection with resource extraction payment transparency. We rely particularly on those comment letters that provided quantified estimates

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<sup>319</sup> As discussed above, our discretionary choices are informed by the statutory mandate, and thus, discussion of the benefits and costs of those choices will necessarily involve the benefits and costs of the underlying statute.

and were transparent about their methodologies. As discussed in more detail below, after considering the comment letters, we determined that it was appropriate to modify and/or expand upon some of the submitted estimates and methodologies to reflect data and information submitted by other commenters, as well as our own judgment and experience.

The baseline the Commission uses to analyze the potential effects of the proposed rules is the current set of regulations and market practices.<sup>320</sup> To the extent not already encompassed by existing regulations and current market practices, the proposed rules likely would have a substantial impact on the disclosure practices of, and costs faced by, resource extraction issuers. The magnitude of the potential effects on costs of the proposed disclosure requirements would depend on the number of affected issuers and individual issuers' costs of compliance. We expect that the proposed rules would affect both U.S. issuers and foreign issuers that meet the definition of "resource extraction issuer" in substantially the same way, except for those issuers already subject to similar rules adopted in the EEA member countries or Canada as discussed below in Section III.C.1. The discussion below describes the Commission's understanding of the markets that are affected by the proposed rules. We estimate the number of affected issuers in this section and quantify their costs in Section III.B.2 below.

To estimate the number of potentially affected issuers, we use data from Exchange Act annual reports for 2014, the latest full calendar year. We consider all Forms 10-K, 20-F, and 40-F filed in 2014 by issuers with oil, natural gas, and mining Standard Industrial Classification

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<sup>320</sup> See Section I.

(“SIC”) codes<sup>321</sup> and, thus, are most likely to be resource extraction issuers. We also considered filings by issuers that do not have the above mentioned oil, natural gas, and mining SIC codes and added them to the list of potentially affected issuers if we determined that they might be affected by the proposed rules.<sup>322</sup> In addition, we have attempted to remove issuers that use oil, natural gas, and mining SIC codes but appear to be more accurately classified under other SIC codes based on the disclosed nature of their business. Finally, we have excluded royalty trusts from our analysis, because we believe it is uncommon for such companies to make the types of payments that would be covered by the proposed rules. From these filings, we estimate that the number of potentially affected issuers is 877. We note that this number does not reflect the number of issuers that actually made resource extraction payments to governments in 2014, but represents the estimated number of issuers that might make such payments.

In the following economic analysis, we discuss the potential benefits and costs and likely effects on efficiency, competition, and capital formation that might result from both the new reporting requirement mandated by Congress and from the specific implementation choices that we have made in formulating these proposed rules.<sup>323</sup> We analyze these potential economic effects in Sections III.B and III.C and provide qualitative and, wherever possible, quantitative discussions of the potential costs and benefits that might result from the payment reporting requirement and specific implementation choices, respectively.

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<sup>321</sup> Specifically, the oil, natural gas, and mining SIC codes considered are 1000, 1011, 1021, 1031, 1040, 1041, 1044, 1061, 1081, 1090, 1094, 1099, 1220, 1221, 1222, 1231, 1311, 1321, 1381, 1382, 1389, 1400, 2911, 3330, 3331, 3334, and 3339.

<sup>322</sup> These are issuers whose primary business is not necessarily resource extraction but which have some resource extraction operations, such as ownership of mines.

<sup>323</sup> Our consideration of potential benefits and costs and likely effects on efficiency, competition, and capital formation also is reflected in Section II.

## **B. Potential Effects Resulting from the Payment Reporting Requirement**

### **1. Benefits**

As noted above, we understand that Section 13(q) and the rules required thereunder are intended to advance the important U.S. foreign policy objective of combatting global corruption and, in so doing, to potentially improve accountability and governance in resource-rich countries around the world.<sup>324</sup> The statute seeks to realize these goals by improving transparency about payments extractive industries make to national and subnational governments, including local governmental entities.<sup>325</sup> While these statutory goals and intended benefits are of global significance, the potential positive economic effects that may result cannot be readily quantified with any precision. The current empirical evidence on the direct causal effect of increased transparency in the resource extraction sector on societal outcomes is inconclusive,<sup>326</sup> and several academic papers noted an inherent difficulty in empirically validating a causal link between transparency interventions and governance improvements.<sup>327</sup> Further, we note that no

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<sup>324</sup> See Section I.E above.

<sup>325</sup> See *id.*

<sup>326</sup> For positive findings, see Caitlin C. Corrigan, “Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative”, *Resources Policy*, 40 (2014), 17–30 (finding that the negative effect of resource abundance on GDP per capita, the capacity of the government to formulate and implement sound policies and the level of rule of law is mitigated in EITI countries but noting that the EITI has little effect on level of democracy, political stability and corruption) and Liz David-Barrett and Ken Okamura, “The Transparency Paradox: Why Do Corrupt Countries Join EITI?”, Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) (finding that EITI compliant countries gain access to increased aid the further they progress through the EITI implementation process and that EITI achieves results in terms of reducing corruption) available at <https://eiti.org/document/transparency-paradox-why-do-corrupt-countries-join-eiti>. For negative empirical evidence, see Ölcer, Dilan (2009): Extracting the Maximum from the EITI (Development Centre Working Papers No. 276): Organisation for Economic Cooperation and Development (finding that the EITI has not been able to significantly lower corruption levels). However, all these papers discuss the earlier version of the EITI which did not require project-level disclosure and rely on data generated prior to the implementation of the 2013 EITI Standard.

<sup>327</sup> See Andrés Mejía Acosta, “The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources”, *Development Policy Review*, 31-S1 (2013), s89–s105; and Alexandra

commenter provided us with data that would allow us to quantify the potential benefits nor did any commenter suggest a source of data or a methodology that we could readily look to in quantifying the rule's potential benefits.

We also think it is important to observe that, despite our inability to quantify the benefits, Congress has directed us to promulgate this disclosure rule. Thus, we believe it reasonable to rely on Congress's determination that the rule will produce the foreign policy and other benefits that Congress sought in imposing this mandate. Because Congress expressly directed us to undertake this rulemaking and because it implicates important foreign policy objectives, we decline to second-guess its apparent conclusion that the benefits from this rule justify its adoption.

Moreover, as noted above, we concur with Congress' judgment that the disclosures could help to achieve a critical foreign policy objective of the U.S. Government. In reaching this conclusion, we are particularly mindful that a broad international consensus has developed regarding the potential benefits of revenue transparency. Not only have the Canadian government<sup>328</sup> and the European Union<sup>329</sup> acknowledged the potential social benefits by

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Gillies and Antoine Heuty, "Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries", *Yale Journal of International Affairs*, Spring/Summer 2011, 25-42.

<sup>328</sup> See, e.g., ESTMA, Section 6 ("The purpose of this Act is to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities."). See also ESTMA Guidance, at 2 ("Canadians will benefit from increased efforts to strengthen transparency in the extractive sector, both at home and abroad. Alongside Canada, the United States and European Union countries have put in place similar public disclosure requirements for their respective extractive industries. Together these reporting systems will contribute to raising global transparency standards in the extractive sector.").

<sup>329</sup> See, e.g., European Commission Memo, "New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions" (June 12, 2013) ("The new disclosure requirement will improve the transparency of payments made to governments all over the world by the extractive and logging industries. Such disclosure will

adopting disclosure requirements similar to what we are proposing, but even members of industry through their participation as stakeholders in EITI have acknowledged the social benefits that revenue transparency can produce.<sup>330</sup> Perhaps most significantly, industry stakeholders in the EITI process (which notably includes a number of industry organizations)<sup>331</sup> have expressly adopted the position that the EITI disclosures (which, as noted above, now include project-level disclosures) produce “[b]enefits for implementing countries” by “strengthening accountability and good governance, as well as promoting greater economic and political stability.”<sup>332</sup> Industry stakeholders in EITI have similarly accepted the view that “[b]enefits to civil society come from increasing the amount of information in the public domain

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provide civil society in resource-rich countries with the information needed to hold governments to account for any income made through the exploitation of natural resources, and also to promote the adoption of the Extractive Industries Transparency Initiative (EITI) in these same countries. . . . The reporting of payments to government by the extractive and logging industries will provide civil society with significantly more information on what specifically is paid by EU companies to host governments in exchange for the right to extract the relevant countries' natural resources. By requiring disclosure of payments at a project level, where those payments had been attributed to a specific project and were material, local communities will have insight into what governments were being paid by EU multinationals for exploiting local oil/gas fields, mineral deposits and forests. This will also allow these communities to better demand that government accounts for how the money had been spent locally. Civil society will be in a position to question whether the contracts entered into between the government and extractive and logging companies had delivered adequate value to society and government.”).

<sup>330</sup> For example, in describing its involvement with EITI, ExxonMobil states that these “efforts to promote revenue transparency have helped fight corruption, improve government accountability and promote greater economic stability around the world.” See <http://corporate.exxonmobil.com/en/current-issues/accountability/transparency/overview>. Similarly, when discussing its role in EITI, Chevron has acknowledged that revenue transparency is “an important pathway to improved governance.” See <http://chevron.com/news/speeches/release/?id=2009-02-16-robertson>. Royal Dutch Shell has also expressed the position that “[r]evenue transparency provides citizens with an important tool to hold their government representatives accountable and to advance good governance.” See <http://www.shell.com/global/environment-society/society/business/payments-to-governments.html>.

<sup>331</sup> <https://eiti.org/supporters/partnerorganizations>.

<sup>332</sup> <https://eiti.org/eiti/benefits>.

about those revenues that governments manage on behalf of citizens, thereby making governments more accountable.”<sup>333</sup>

While the objectives of Section 13(q) do not appear to be ones that would necessarily generate measurable, direct economic benefits to investors or issuers, investors and issuers might benefit from the proposed rule’s indirect effects. In the following paragraphs, we discuss existing theoretical arguments and empirical evidence that reduced corruption and better governance could have longer term positive impacts on economic growth and investment in certain countries where the affected issuers operate, which could in turn benefit issuers and their shareholders.

There are several theoretical causal explanations for why reducing corruption might increase economic growth and political stability, which in turn might reduce investment risk.<sup>334</sup> High levels of corruption could introduce inefficiencies in market prices as a result of increased political risks and the potential awarding of projects to companies for reasons other than the merit of their bids. This, in turn, would prop up inefficient companies and limit investment opportunities for others. These potential distortions could have a negative impact on the economies of countries with high corruption, particularly to the extent that potential revenue streams are diminished or diverted. Additionally, the cost of corrupt expenditures, direct or indirect, impacts profitability, and, if the cost is sufficiently high, some potentially economically efficient or productive investments may not be made. Thus, reducing corruption could increase

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<sup>333</sup> Id.

<sup>334</sup> See, e.g., reviews by P. Bardhan, “Corruption and Development: A Review of Issues,” *Journal of Economic Literature*, 35, no. 3, 1320–1346 (1997) and J. Svensson, “Eight Questions about Corruption”, *Journal of Economic Perspectives*, 19, no. 3, 19–42 (2005).

the number of productive investments and the level of profitability of each investment and could lead to improved efficiency in the allocation of talent, technology, and capital. Insofar as these effects are realized, each of them could benefit issuers operating in countries with reduced corruption levels. These and other considerations form a basis for several dynamic general equilibrium models predicting a negative relationship between corruption and economic development.<sup>335</sup>

A number of empirical studies have also shown that reducing corruption might result in an increase in the level of GDP and higher rate of economic growth through more private investments, better deployment of human capital, and political stability.<sup>336</sup> Other studies find that corruption reduces economic growth both directly and indirectly, through lower investments.<sup>337</sup> To the extent that increased transparency could lead to a reduction in corruption and, in turn, improved political stability and investment climate, some investors may consider such improvements in their investment decisions, including when pricing resource extraction assets of affected issuers operating in these countries.<sup>338</sup> We note that some commenters

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<sup>335</sup> See, e.g., I. Ehrlich and F. Lui “Bureaucratic Corruption and Endogenous Economic Growth,” *Journal of Political Economy*, 107 (6), 270–293 (1999); K. Blackburn, N. Bose, and E.M. Haque, “The Incidence and Persistence of Corruption in Economic Development”, *Journal of Economic Dynamics and Control* 30, 2447–2467 (2006); and C. Leite and J. Weidmann, “Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth”, International Monetary Fund Working Paper No. 99/85 (July 1999).

<sup>336</sup> See, e.g., P. Mauro, “The effects of corruption on growth, investment and government expenditure: A cross country analysis,” in K.A. Elliot (ed.) *Corruption and the Global Economy*, Washington D.C.: Institute for International Economics, 83–107 (1997); H. Poirson, “Economic Security, Private Investment, and Growth in Developing Countries” International Monetary Fund Working Paper No. 98/4 (Jan. 1998); Institute for Economics and Peace, *Peace and Corruption Report* (2015).

<sup>337</sup> See Pak Hung Mo, “Corruption and Economic Growth.” *Journal of Comparative Economics* 29, 66–79 (2001); K. Gyimah-Brempong, “Corruption, economic growth, and income inequality in Africa”, *Economics of Governance* 3, 183–209 (2002); and Pierre-Guillaume Méon and Khalid Sekkat, “Does corruption grease or sand the wheels of growth?”, *Public Choice* 122, 69–97 (2005).

<sup>338</sup> Several studies present evidence that reduction in corruption increases foreign direct investments. See, e.g., S.-J. Wei, “How Taxing is Corruption on International Investors?” *NBER Working Paper* 6030 (1997) and G.

supported this view.<sup>339</sup> There could also be positive externalities from increased investor confidence to the extent that improved economic growth and investment climate could benefit other issuers working in those countries. Although we cannot state with certainty that such a result might occur, we note that there is some empirical evidence suggesting that lower corruption might reduce the cost of capital and improve valuation for some issuers.<sup>340</sup>

Although there is no conclusive empirical evidence that would confirm whether the project-level, public disclosure that we are proposing will in fact reduce corruption, we note that many commenters emphasized the potential benefits to civil society of such public disclosure.<sup>341</sup> Indeed, many of these commenters stated that the benefits to civil society of project-level reporting in terms of helping to reduce corruption and enhance accountability are significantly greater than those of country-level reporting.<sup>342</sup> As discussed in Section I.E above, many of these commenters stated that public availability of project-level data would enable civil society groups and local communities to know how much their governments earn from the resources that are removed from their respective territories. This information would help empower them to advocate for a fairer share of revenues, double-check government-published budget data, and

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Abed and H. Davoodi, "Corruption, Structural Reforms, and Economic Performance in the Transition Economies," International Monetary Fund Working Paper No. 00/132 (July 2000).

<sup>339</sup> See letter from Hermes Equity Ownership Services Ltd. (Mar. 2, 2011) ("Hermes") (anticipating benefits of lower capital costs and risk premiums as a result of improved stability stemming from the statutory requirements and lessened degree of uncertainty promoted by greater transparency).

<sup>340</sup> See D. Kaufmann and S. J. Wei "Does "Grease Money" Speed Up the Wheels of Commerce?" NBER Working Paper 7093 (1999) (finding, using survey evidence, that firms that pay fewer bribes have lower, not higher, cost of capital) and C. Lee and D. Ng, "Corruption and International Valuation: Does Virtue Pay?" *Journal of Investing*, 18, no. 4, 23–41 (2009) (finding that firms from more corrupt countries trade at significantly lower market multiples).

<sup>341</sup> See, e.g., letters from Global Witness 1; NACE; Oxfam 1; PWYP 1; PWYP-CAM; PWYP-IND; PWYP-ZIM; RWI 1; and Syena.

<sup>342</sup> See letter from ERI 1; see also letter from Bill and Melinda Gates Foundation (Feb. 9, 2012) ("Gates Foundation") and note 341 above.

better calibrate their expectations from the extractive issuers.<sup>343</sup> One commenter further stated that project-level reporting would enable both local government officials and civil society groups to monitor the revenue that flows back to the regions from the central government and ensure that they receive what is promised—a benefit that would be unavailable if revenue streams were not differentiated below the country level.<sup>344</sup> Another commenter noted that project-level reporting would shine greater light on dealings between resource extraction issuers and governments, thereby providing companies with “political cover to sidestep government requests to engage in potentially unethical activities.”<sup>345</sup>

We also note that some commenters (including a number of large investors) have stated that the disclosures required by Section 13(q) could provide useful information to them in making investment decisions.<sup>346</sup> Although we do not believe this is the primary objective of the required disclosures, we acknowledge the possibility that the disclosures could provide potentially useful information to certain investors. Some commenters, for example, noted that the new disclosures could help investors better assess the risks faced by resource extraction issuers operating in resource-rich countries.<sup>347</sup> Other commenters compared the benefits of

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<sup>343</sup> See, e.g., letter from ERI 1; see also letter from Gates Foundation (stating that it is important to seek disclosure below the country level, that project-level disclosure will give both citizens and investors valuable information, and that defining “project” as a geologic basin or province would be of limited use to both citizens and investors).

<sup>344</sup> See letter from ERI 1.

<sup>345</sup> See letter from EG Justice 1.

<sup>346</sup> See letter from Calvert 1 (stating that payment information could “materially and substantially improve investment decision making”). See also note 318 above and accompanying text.

<sup>347</sup> See, e.g., letters from Calvert 1; ERI 2; Global Witness 1; PGGM; and Oxfam 1. Social, political, reputational, regulatory, and tax risks were mentioned in the letters. Another commenter maintained that transparency of payments is a better indicator of risk for extractive issuers than the bond markets and is also a better indicator of financial performance. See letter from Vale Columbia Center (Dec. 16, 2011). The commenter did not provide empirical evidence that compares transparency to bond market indicators directly.

project-level and country-level reporting. One commenter noted that project-level reporting would enable investors to better understand the risk profiles of individual projects within a given country, which could vary greatly depending on a number of factors such as regional unrest, personal interest by powerful government figures, degree of community oppression, and environmental sensitivity.<sup>348</sup> This commenter indicated that project-level disclosures would enable investors to better understand these risks, whereas country-level reporting would allow issuers to mask particularly salient projects by aggregating payments with those from less risky projects. Some commenters noted that a further benefit of project-level disclosures is that it would assist investors in calculations of cost curves that determine whether and for how long a project may remain economical, using a model that takes into account political, social, and regulatory risks.<sup>349</sup> While we acknowledge these comments, we note that the incremental benefit to investors from this information may be limited given that a significant number of the impacted issuers, in particular all issuers that are not smaller reporting companies, are already required to disclose their most significant risks in their Exchange Act annual reports.<sup>350</sup>

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<sup>348</sup> See letter from ERI 2. This commenter also noted that unusually high signing bonus payments for a particular project may be a proxy for political influence, whereas unusually low tax or royalty payments may signal that a project is located in a zone vulnerable to attacks or community unrest.

<sup>349</sup> See letter from Calvert Asset Management Company and SIF (Nov. 15, 2010). But see note 350 above and accompanying text.

<sup>350</sup> See Item 1A of Form 10-K and Item 3.D of Form 20-F. About 50 percent of affected issuers are smaller reporting companies and they are not obligated to disclose in their Exchange Act annual reports significant risk factors they face. For such companies, the resource extraction projects payments disclosure could provide incremental information that might benefit some investors, to the extent that they would not otherwise have a requirement to disclose the political or economic risks related to operating in resource-rich countries. We do not, however, have data on whether such companies have material operations in politically volatile regions and whether they have exposure to risks described by commenters.

## 2. Costs

### *a. Commenters' Views of Compliance Costs*

Many commenters stated that the reporting regime mandated by Section 13(q) would impose significant compliance costs on issuers. Several commenters specifically addressed the cost estimates presented in the Paperwork Reduction Act (“PRA”) section of the 2010 Proposing Release.<sup>351</sup> Other commenters discussed the costs and burdens to issuers generally as well as costs that could have an effect on the PRA analysis.<sup>352</sup> As discussed below, in response to comments we received, we have provided our estimate of both initial and ongoing compliance costs. In addition, also in response to comments, we have made several changes to our PRA estimates that are designed to better reflect the burdens associated with the new collections of information.

Some commenters on the 2010 Proposing Release disagreed with our industry-wide estimate of the total annual increase in the collection of information burden and argued that it underestimated the actual costs that would be associated with the rules.<sup>353</sup> These and other commenters stated that, depending upon the final rules adopted, the compliance burdens and costs arising from implementation and ongoing compliance with the rules would be significantly

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<sup>351</sup> See letters from API 1; API 2; Barrick Gold; ERI 2; ExxonMobil 1; ExxonMobil (Oct. 25, 2011) (“ExxonMobil 3”); NMA 2; Rio Tinto; RDS 2; and RDS 4.

<sup>352</sup> See, e.g., letters from BP 1; Chamber Energy Institute; Chevron; Cleary; Hermes; and PWYP 1.

<sup>353</sup> See letters from API 1 and ExxonMobil 1.

higher than those estimated by the Commission.<sup>354</sup> However, these commenters generally did not provide any quantitative analysis to support their estimates.<sup>355</sup>

Commenters also noted that modifications to issuers' core enterprise resource planning systems and financial reporting systems would be necessary to capture and report payment data at the project level, for each type of payment, government payee, and currency of payment.<sup>356</sup> These commenters estimated that the resulting initial implementation costs of the 2010 Proposing Release would be in the tens of millions of dollars for large issuers and millions of dollars for many small issuers.<sup>357</sup> Two of these commenters provided examples of the modifications that would be necessary, including establishing additional granularity to existing coding structures (e.g., splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by "project," building new collection tools within financial reporting systems, establishing a trading partner structure to identify and provide granularity around government entities, establishing transaction types to accommodate types of payment (e.g., royalties, taxes, or bonuses), and developing a systematic approach to handle "in-kind" payments.<sup>358</sup> These two commenters estimated that total industry

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<sup>354</sup> See letters from API 1; API 2; API 3; Barrick Gold; ExxonMobil 1; NMA 2; Rio Tinto; and RDS 2.

<sup>355</sup> See letters from API 1 and ExxonMobil 1. ExxonMobil 1 did provide estimated implementation costs of \$50 million if the definition of "project" is narrow and the level of disaggregation is high across other reporting parameters. This estimate is used in our analysis below of the expected implementation costs.

<sup>356</sup> See letters from API 1; ExxonMobil 1; and RDS 2.

<sup>357</sup> See letters from API 1; ExxonMobil 1; and RDS 2. These commenters did not describe how they defined small and large issuers.

<sup>358</sup> See letters from API 1 and ExxonMobil 1.

costs for initial implementation of the final rules could amount to hundreds of millions of dollars.<sup>359</sup>

These commenters added that these estimated costs could be significantly greater depending on the scope of the final rules.<sup>360</sup> They suggested, for example, that costs could increase depending on how the final rules define “project” and whether the final rules require reporting of non-consolidated entities, require “net” and accrual reporting, or require an audit.<sup>361</sup> Another commenter estimated that the initial set up time and costs associated with the rules implementing Section 13(q) would require 500 hours for the issuer to change its internal books and records and \$100,000 in information technology consulting, training, and travel costs.<sup>362</sup> One commenter representing the mining industry estimated that start-up costs, including the burden of establishing new reporting and accounting systems, training local personnel on tracking and reporting, and developing guidance to ensure consistency across reporting units, would be at least 500 hours for a mid-to-large sized multinational issuer.<sup>363</sup>

Two commenters stated that arriving at a reliable estimate for the ongoing annual costs of complying with the rules would be difficult because the rules were not yet fully defined but suggested that a “more realistic” estimate than the estimate included in the 2010 Proposing

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<sup>359</sup> See letters from API 1 and ExxonMobil 1.

<sup>360</sup> See letters from API 1; ExxonMobil 1; and RDS 2.

<sup>361</sup> See letters from API 1; ExxonMobil 1; and RDS 2. As previously discussed, the proposed rules do not require the payment information to be audited or reported on an accrual basis, so commenters’ concerns about possible costs associated with these items should be alleviated. See Section II.G.5 above.

<sup>362</sup> See letter from Barrick Gold.

<sup>363</sup> See letter from NMA 2.

Release is hundreds of hours per year for each large issuer that has many foreign locations.<sup>364</sup>

Commenters also indicated that costs related to external professional services would be significantly higher than the Commission's estimate, resulting primarily from XBRL tagging and higher printing costs, although these commenters noted that it is not possible to estimate these costs until the specific requirements of the final rules are determined.<sup>365</sup>

One commenter estimated that ongoing compliance with the rules implementing Section 13(q) would require 100-200 hours of work at the head office, an additional 100-200 hours of work providing support to its business units, and 40-80 hours of work each year by each of its 120 business units, resulting in an approximate yearly total of 4,800-9,600 hours and \$2,000,000-\$4,000,000.<sup>366</sup> One large multinational issuer estimated an additional 500 hours each year, including time spent to review each payment to determine if it is covered by the reporting requirements and ensure it is coded to the appropriate ledger accounts.<sup>367</sup> Another commenter representing the mining industry estimated that, for an issuer with a hundred projects or reporting units, the annual burden could be nearly 10 times the estimated PRA burden set out in the 2010 Proposing Release.<sup>368</sup> This commenter noted that its estimate takes into account the task of collecting, cross-checking, and analyzing extensive and detailed data from multiple jurisdictions around the world, as well as the potential for protracted time investments to comply with several

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<sup>364</sup> See letters from API 1 and ExxonMobil 1 (each noting that estimates would increase if the final rules contain an audit requirement or if the final rules are such that issuers are not able to automate material parts of the collection and reporting process).

<sup>365</sup> See letters from API 1 and ExxonMobil 1.

<sup>366</sup> See letter from Rio Tinto. These estimates exclude initial set-up time required to design and implement the reporting process and develop policies to ensure consistency among business units. They also assume that an audit is not required.

<sup>367</sup> See letter from Barrick Gold.

<sup>368</sup> See letter from NMA 2.

aspects of the rules proposed in 2010 that are not included in the current proposed rules.<sup>369</sup> This commenter also noted that the estimate in the 2010 Proposing Release did not adequately capture the burden to an international company with multiple operations where a wide range of personnel would need to be involved in capturing and reviewing the data for the required disclosures as well as for electronically tagging the information in XBRL format.<sup>370</sup> A number of commenters submitted subsequent letters reiterating and emphasizing the potential of the proposed rules to impose substantial costs.<sup>371</sup>

Other commenters believed that concerns over compliance costs have been overstated.<sup>372</sup> One commenter stated that most issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q) and that many issuers currently are subject to reporting requirements at a project level.<sup>373</sup> Another commenter anticipated that while the rules would likely result in additional costs to resource extraction issuers, such costs would be marginal in scale because, in the commenter's experience, many issuers already have extensive systems in place to handle their current reporting requirements and any adjustments needed as a result of Section 13(q) could be done in a timely and cost-

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<sup>369</sup> See letter from NMA 2. Many of the time investments outlined by this commenter would no longer apply to the proposed rules or would be significantly reduced from when this commenter's letter was submitted, such as the cost of seeking information from non-consolidated "controlled" entities, obtaining compliance advice on the application of undefined terms such as "project," and reviews of the disclosure in connection with periodic certifications under the Sarbanes Oxley Act. Certain potential costs outlined in this letter, however, would still apply, such as those associated with implementing new systems based on our proposed definition of "project" and other definitions and costs associated with attempting to secure an exemption from the Commission when foreign law prohibitions on disclosure apply.

<sup>370</sup> See letter from NMA 2.

<sup>371</sup> See letters from API 2; ExxonMobil 3; and RDS 4.

<sup>372</sup> See letters from ERI 2; Oxfam 1; PWYP 1; and RWI 1.

<sup>373</sup> See letter from RWI 1 (noting that Indonesia requires reporting at the production sharing agreement level and that companies operating on U.S. federal lands report royalties paid by lease).

effective manner.<sup>374</sup> Another commenter believed that issuers could adapt their current systems in a cost-effective manner because they should be able to adapt a practice undertaken in one operating environment to those in other countries without substantial changes to the existing systems and processes of an efficiently-run enterprise.<sup>375</sup>

Another commenter stated that, in addition to issuers already collecting the majority of information required to be made public under Section 13(q) for internal record-keeping and audits, U.S. issuers already report such information to tax authorities at the lease and license level.<sup>376</sup> This commenter added that efficiently-run issuers should not have to make extensive changes to their existing systems and processes to export practices undertaken in one operating environment to another.<sup>377</sup> However, another commenter disagreed that issuers already report the payment information required by Section 13(q) for tax purposes.<sup>378</sup> This commenter also noted that tax reporting and payment periods may differ.

One commenter, while not providing competing estimates, questioned the accuracy of the assertions relating to costs from industry participants.<sup>379</sup> This commenter cited the following factors that led it to question the cost assertions from industry participants: (i) some issuers already report project-level payments in certain countries in one form or another and under a variety of regimes; (ii) some EITI countries are already moving toward project-level disclosure;

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<sup>374</sup> See letter from Hermes.

<sup>375</sup> See letter from RWI 1.

<sup>376</sup> See letter from PWYP 1.

<sup>377</sup> See id. (citing statement made by Calvert Investments at a June 2010 IASB-sponsored roundtable).

<sup>378</sup> See letter from Rio Tinto (“[t]his is a simplistic view, and the problem is that tax payments for a specific year are not necessarily based on the actual accounting results for that year.”).

<sup>379</sup> See letter from ERI 2.

and (iii) it is unclear whether issuers can save much time or money by reporting government payments at the material project or country level. This commenter also explained that issuers must keep records of their subsidiaries' payments to governments as part of the books and records provisions of the Foreign Corrupt Practices Act, so the primary costs of reporting these payments would be in the presentation of the data rather than any need to institute new tracking systems. This commenter indicated that to the extent that issuers may need to implement new accounting and reporting systems to keep track of government payments, issuers presumably would need to develop mechanisms for receiving and attributing information on individual payments regardless of the form the final rules take. The commenter also observed that the 2010 proposed rules would require companies to provide the payment information in its raw form, rather than requiring them to process it and disclose only those payments from projects they deem to be "material," which could result in savings to issuers of time and money by allowing them to submit data without having to go through a sifting process. This commenter observed that none of the commenters who submitted cost estimates attempted to quantify the savings that would "supposedly accrue" if disclosure were limited to "material" projects, as compared to disclosure of all projects, and noted that the Commission was not required to accept commenters' bare assertions that their "marginal costs would be reduced very significantly."

***b. Quantitative Estimates of Compliance Costs***

To assess the potential initial and ongoing costs of compliance with the proposed rules, we use the quantitative information supplied by commenters in response to the 2010 Proposing

Release.<sup>380</sup> Our general approach is to estimate the upper and lower bounds of the compliance costs for each potentially affected issuer and then to sum up these estimates to estimate the aggregate impact.<sup>381</sup> As discussed in Section III.A above, we estimate that, as of the end of 2014, 877 issuers would be potentially affected by the proposed rules.<sup>382</sup> However, in determining which issuers are likely to bear the full costs of compliance with the proposed rules, we make two adjustments to the list of affected issuers. First, we exclude those issuers that would be subject to foreign jurisdictions' rules substantially similar to our proposed rules and therefore would likely already be bearing compliance costs. Second, we exclude small issuers that likely could not have made any payment above the proposed de minimis amount of \$100,000 to any government entity in 2014.

To address the first consideration, we searched the filed annual forms and forms' metadata for issuers that have a business address, are incorporated, or are listed on markets in the EEA or Canada. For purposes of our analysis, we assume that those issuers may already be subject to similar resource extraction payment disclosure rules in those jurisdictions by the time

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<sup>380</sup> See letters from Barrick Gold, ExxonMobil 1, and Rio Tinto discussed above in Section III.B.2.a. NMA also provided initial compliance hours that are similar to Barrick Gold. See letter from NMA 2. We do not have comment letters with more up-to-date quantitative estimates of compliance costs.

<sup>381</sup> We acknowledge that there may be some uncertainty surrounding who will ultimately bear the compliance costs. Depending on market conditions and the degree of competition, issuers may attempt to pass some or all of their costs on to other market participants. This consideration, however, does not change our estimates.

<sup>382</sup> We acknowledge that, as one commenter suggested, some of these issuers are affiliated and thus are likely to share compliance systems and fixed costs of creating such systems. See letter from Publish What You Pay United States (Nov. 12, 2015) ("PWYP-US 2"). Due to difficulties in determining affiliation status, however, we have not attempted to eliminate these issuers from our estimates, and therefore our estimates may overstate the potential costs. Nevertheless, this potential overstatement of costs would not apply in one of the cases we consider below, the case of no fixed costs, because the costs would depend only on the total assets of affected issuers, not on the number of them.

the proposed rules are adopted and, thus, that the additional costs to comply with our proposed rules would be much lower than costs for other issuers. We identified 268 such issuers.<sup>383</sup>

Second, among the remaining 609 issuers (i.e., 877 minus 268) we searched for issuers that, in the most recent fiscal year as of the date of their annual report filing, have both revenues and absolute value net cash flows from investing activities of less than the proposed de minimis payment threshold of \$100,000. Under those financial constraints, such issuers are unlikely to have made any non-de minimis and otherwise reportable payments to governments and would be unlikely to be subject to the proposed reporting requirements. We identified 138 such issuers.

Taking these estimates of the number of excluded issuers together, we estimate that approximately 471 issuers (i.e., 877 minus 268 minus 138) would bear the full costs of compliance with the proposed rules.<sup>384</sup>

To establish an upper and lower bound for the initial compliance costs estimates, we use the initial compliance cost estimates from Barrick Gold and ExxonMobil referenced above. We note, however, that these cost estimates were provided by the commenters during the comment period after the 2010 Proposing Release and were based on policy choices made in that proposal and reflected the other international regulatory regimes in place at that time. Since then we have changed our approach (e.g., we have proposed to define the term “control” based on accounting

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<sup>383</sup> If we adopt an alternative reporting option as part of the final rules, and the disclosure requirements of those jurisdictions are subsequently deemed to be substantially similar to our rules, then the additional cost would be negligible compared to compliance costs we consider in this section.

<sup>384</sup> Because it may be uncertain at the beginning of a financial period as to whether payments from an issuer will exceed the de minimis threshold by the end of such period, an excluded issuer may incur costs to collect the information that would need to be reported under the proposed rules even if that issuer is not subsequently required to file an annual report on Form SD. To the extent that excluded issuers incur such costs, our estimate may understate the aggregate compliance costs associated with the proposed rules.

principles, which we believe would be easier and less costly for issuers to apply)<sup>385</sup> and the international reporting regimes have changed significantly.<sup>386</sup> These developments are likely to significantly lower the compliance costs associated with the currently proposed rules. However, we do not have any reliable quantitative assessment of the extent to which these changes would reduce commenters' cost estimates and, thus, we use the original commenters' estimates without adjustment.

In our methodology to estimate the initial compliance costs, we take the specific issuer estimates from Barrick Gold and ExxonMobil, \$500,000 and \$50,000,000, respectively,<sup>387</sup> apply these costs to the average issuer, and then multiply the costs by the number of affected issuers. However, because Barrick Gold and ExxonMobil are very large issuers and their compliance costs may not be representative of other types of issuers, we apply these costs to all potentially affected issuers as a percentage of total assets. This allows for the compliance cost estimate for each potentially affected issuer to vary by their size, consistent with our expectation that larger issuers will face higher compliance costs. For example, we expect larger, multinational issuers to need more complex payment tracking systems compared to smaller, single country based

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<sup>385</sup> See Section II.D above.

<sup>386</sup> In this regard, we note that some affected issuers, even if they are not subject to foreign disclosure rules, might have subsidiaries or other entities under their control that are subject to such rules. These issuers thus would face lower compliance costs because they would already have incurred some of these costs through such subsidiaries and other controlled entities.

<sup>387</sup> Barrick Gold estimated that it would require 500 hours for initial changes to internal books and records and processes, and 500 hours for ongoing compliance costs. At an hourly rate of \$400, this amounts to \$400,000 (1,000 hours \* \$400) for hourly compliance costs. Barrick Gold also estimated that it would cost \$100,000 for initial IT/consulting and travel costs, for a total initial compliance cost of \$500,000. A similar analysis for ExxonMobil estimated their initial compliance costs to be \$50 million. See 2012 Adopting Release, Section III.D for details.

issuers. This approach is consistent with the method used in the 2012 Adopting Release, where we estimated the initial compliance costs to be between 0.002% and 0.021% of total assets.<sup>388</sup>

We calculate the average total assets of the 471 potentially affected issuers to be approximately \$5.8 billion.<sup>389</sup> Applying the ratio of initial compliance costs to total assets (0.002%) from Barrick Gold, we estimate the lower bound of total initial compliance costs for all issuers to be \$54.96 million ( $0.002\% * \$5,834,361,000 * 471$ ). Applying the ratio of initial compliance costs to total assets (0.021%) from ExxonMobil, we estimate the upper bound of total initial compliance costs for all issuers to be \$577.1 million ( $0.021\% * \$5,834,361,000 * 471$ ). The table below summarizes the upper and lower bound of total initial compliance costs under the assumption that compliance costs vary according to the issuer's size.

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<sup>388</sup> See 2012 Adopting Release at Section III.D for details (the approach we use here is referred to as Method 1 in that release). In the 2012 Adopting Release we also used another method (referred to as Method 2) to estimate compliance costs. With Method 2, we first estimated the compliance costs for small and large issuers (as determined by market capitalization) using the same assumptions as in Method 1 that compliance costs are a constant fraction of issuer's total assets (*i.e.*, that all costs are variable and there is no fixed component to the costs), and then aggregated the compliance costs for all issuers. Although this approach was intended to provide limited insight into any differential cost impacts on small versus large issuers, it did not separate fixed and variable cost components of the total compliance costs. Therefore, it did not allow us to apply a differential cost structure to small and large issuers. In addition, because of poor data availability and data quality on market capitalization for small and foreign issuers, the Method 2 approach may yield less accurate estimates than the approach we use in this release (on the other hand, Method 1 could be properly applied because we collected total assets data for all affected issuers). As a consequence, we now believe that the disaggregation and subsequent aggregation of small and large issuer cost estimates does not provide additional insights into the difference in cost structure for small versus large issuers and any effects of this difference on the aggregate costs. Consequently, we have used only one estimation approach in this proposal. As discussed below, however, we do believe that there is a fixed component to the compliance costs which could potentially have a differential impact on small issuers, and we have expanded the Method 1 approach to allow for a fixed costs component in the cost structure. We also request comments on both the fixed and variable components of compliance costs to enable us to better quantitatively estimate such impact.

<sup>389</sup> For the 471 potentially affected issuers, we collected their total assets for the fiscal year that corresponds to their Exchange Act annual reports for 2014 from XBRL filings that accompany issuers' annual reports on EDGAR and from Compustat; if these two data sources varied on an issuer's total assets, we used the higher of the two values. For the remaining issuers that do not have total assets data from either of these two data sources, we manually collected the data on total assets from their filings. We then calculated the average of those total assets across all issuers that have the data.

<b>Average issuer initial compliance costs assuming no fixed costs</b>		<b>Calculation</b>
Average 2014 total assets of all affected issuers	\$5,834,361,000	
Average initial compliance costs per issuer using Barrick Gold percentage of total assets (lower bound)	\$116,687	\$5,834,361,000*0.002%
<b>Total initial compliance costs using Barrick Gold (lower bound)</b>	<b>\$54,959,577</b>	\$116,687*471
Average initial compliance costs per issuer using Exxon Mobil's percentage of total assets (upper bound)	\$1,225,216	\$5,834,361,000*0.021%
<b>Total initial compliance costs using ExxonMobil (upper bound)</b>	<b>\$577,076,736</b>	\$1,225,216*471

We also recognize that it is possible that some compliance costs may not scale by issuer size and that smaller issuers in particular may be subject to certain fixed costs that do not vary with the size of the issuers' operations. While commenters did not provide any information on what fraction of the initial compliance costs would be fixed versus variable, we assume that fixed costs are equal to \$500,000—the lower of the two compliance cost estimates provided by commenters. To find the lower and upper bound estimates of compliance costs in this case, we assume that each issuer's costs are the maximum between the fixed costs of \$500,000 and, respectively, the lower bound (0.002% of total assets) or the upper bound (0.021% of total assets) of the variable costs. Applying these lower and upper bounds to each issuer and summing across all issuers, we find that the lower bound estimate is \$262 million (or, on average, \$0.56 million per issuer) and the upper bound estimate is \$726 million (or, on average, \$1.54 million per issuer).

The table below summarizes the upper and lower bound of total initial compliance costs under two fixed costs assumptions.<sup>390</sup> We note that our upper bound estimates are consistent with two commenters' qualitative estimates of initial implementation costs.<sup>391</sup> We also note that, if the actual fixed costs component is between \$0 and \$500,000, the lower and upper bounds of compliance costs estimates would be between our estimates for the two opposite cases.

	Initial compliance costs assuming no fixed costs		Initial compliance costs assuming fixed costs of \$500,000	
	Costs for an average issuer	Total costs	Costs for an average issuer	Total costs
<b>Lower bound</b>	\$116,687	\$54,959,680	\$557,092	\$262,390,300
<b>Upper bound</b>	\$1,225,216	\$577,076,700	\$1,540,969	\$725,796,600

We acknowledge significant limitations on our analysis that may result in the actual costs being significantly lower. First, the analysis is limited to two large issuers' estimates from two different industries, mining and oil and gas, and the estimates may not accurately reflect the initial compliance costs of all affected issuers. Second, the commenters' estimates were

<sup>390</sup> The total estimated compliance cost for PRA purposes is \$79,302,480. See Section IV below. The compliance costs for PRA purposes would be encompassed in the total estimated compliance costs for issuers. As discussed in detail below, our PRA estimate includes costs related to tracking and collecting information about different types of payments across projects, governments, countries, subsidiaries, and other controlled entities. The estimated costs for PRA purposes are calculated by treating compliance costs as fixed costs and by only monetizing costs associated with outside professional services. Therefore, despite using similar inputs for calculating these costs, the PRA estimate differs from the lower and upper bounds calculated above.

<sup>391</sup> See letters from API 1 ("Total industry costs just for the initial implementation could amount to hundreds of millions of dollars even assuming a favorable final decision on audit requirements and reasonable application of accepted materiality concepts.") and ExxonMobil 1.

generated based on our initial proposal and they do not reflect the current proposed rules or the international transparency regimes that subsequently have been adopted by other jurisdictions.<sup>392</sup>

We also acknowledge certain limitations on our analysis that could potentially cause the cost to be higher than our estimates. First, we assume that the variable part of the compliance costs is a constant fraction of total assets, but the dependence of costs on issuer size might not be linear (e.g., costs could grow disproportionately faster than issuer assets). Second, commenters mentioned other potential compliance costs not necessarily captured in this discussion of compliance costs.<sup>393</sup>

We estimate ongoing compliance costs using the same method under the assumptions of no fixed costs and fixed costs of \$200,000 per year (as explained below). After the 2010 Proposing Release, we received quantitative information from three commenters—Rio Tinto, National Mining Association, and Barrick Gold—that we used in the analysis.<sup>394</sup> As in the 2012 Adopting Release, we use these three comments to estimate the ongoing compliance costs as a percentage of total assets to be 0.003%, 0.02%, and 0.0008%, respectively, and the average ongoing compliance costs to be 0.0079% of total assets.<sup>395</sup> For the no fixed costs case, we take

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<sup>392</sup> See, e.g., notes 179 and 386 and accompanying text.

<sup>393</sup> Those could include, for example, costs associated with the termination of existing agreements in countries with laws that prohibit the type of disclosure mandated by the rules, costs of decreased ability to bid for projects in such countries in the future, or costs of decreased competitiveness with respect to non-reporting entities. Commenters generally did not provide estimates of such costs. As discussed further below, we have attempted to estimate the costs associated with potential foreign law prohibitions on providing the required disclosure.

<sup>394</sup> See letters from Barrick Gold, Rio Tinto, and NMA 2. We apply the same caveat as in the initial compliance cost estimates above, namely, that these cost estimates were provided by the commenters during the comment period after the 2010 Proposing Release and were based on policy choices made in that proposal. Changes made to the current proposal and recent international developments could significantly lower the cost estimates.

<sup>395</sup> We estimate the cost percentages the following way. Rio Tinto estimated that it would take between 5,000 and 10,000 hours per year to comply with the requirements, for a total ongoing compliance cost of between \$2 million (5,000\*\$400) and \$4 million (10,000\*\$400). We use the midpoint of their estimate, \$3 million, as their

the average total assets for all affected issuers, \$5,834,361,000, and multiply it by a constant fraction (either the lower bound of 0.0008%, the average of 0.0079%, or the upper bound of 0.02%) of total assets and the number of affected companies (471) to get the total lower bound, the average, and the upper bound of the annual ongoing compliance costs estimates.

Similarly to our estimates of the initial costs, we then consider fixed costs equal to the lowest of three estimates given by the commenters, the Barrick Gold's estimate of \$200,000 per year. To find the lower and upper bound estimates, we assume that each issuer's costs are the maximum between the fixed costs of \$200,000 and either the lower bound (0.0008% of total assets) or the upper bound (0.02% of total assets) of the variable costs, respectively. Applying these lower and upper bounds to each issuer and summing across all issuers, we find that the lower bound estimate is \$105 million per year (or, on average, \$0.22 million per issuer per year) and the upper bound estimate is \$601 million per year (or, on average, \$1.28 million per issuer per year). Our estimates are summarized in the following table. Finally, we note that, if the actual fixed costs component is between \$0 and \$200,000, the lower and upper bounds of

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expected ongoing compliance cost. The National Mining Association (NMA), which represents the mining industry, estimated that ongoing compliance costs would be 10 times our initial estimate from the 2010 Proposing Release, although it did not state specifically the number to which it referred. We believe NMA was referring to our proposed estimate of \$30,000. Although this is the dollar figure for total costs, NMA referred to it when providing an estimate of ongoing costs, so we do the same here, which would result in \$300,000 (10\*\$30,000). Finally, Barrick Gold estimated that it would take 500 hours per year to comply with the requirements, or \$200,000 (500\*\$400) per year. As with the initial compliance costs, we calculate the ongoing compliance cost as a percentage of total assets. Rio Tinto's total assets as of the end of fiscal year 2009 were approximately \$97 billion and their estimated ongoing compliance costs as a percentage of assets is 0.003% (\$3,000,000/\$97,236,000,000). We calculated the average total assets of the mining industry to be \$1.5 billion, and using NMA's estimated ongoing compliance costs, we estimate ongoing compliance costs as a percentage of assets of 0.02% (\$300,000/\$1,515,000,000). Barrick Gold's total assets as of the end of fiscal year 2009 were approximately \$25 billion and their estimated ongoing compliance costs as a percentage of assets is 0.0008% (\$200,000/\$25,075,000,000). See 2012 Adopting Release at Section III.D for details.

compliance costs estimates would be between our lower and upper bounds estimates for the two opposite fixed costs cases.

	Annual ongoing compliance costs under the assumption of no fixed costs		Annual ongoing compliance costs under the assumption of fixed costs of \$200,000	
	Costs for an average issuer	Total costs	Costs for an average issuer	Total costs
<b>Lower bound</b>	\$46,675	\$21,983,870	\$222,837	\$104,956,100
<b>Average</b>	\$460,915	\$217,090,700	\$588,790	\$277,320,000
<b>Upper bound</b>	\$1,166,872	\$549,596,800	\$1,275,390	\$600,708,700

As noted above, we expect that the initial and ongoing compliance costs associated with the proposed rule are likely to be greater for larger, multinational issuers as compared to smaller, single country based issuers, as larger issuers would likely need more complex systems to track and report the required information. However, to the extent there is a significant fixed component to the proposed rules' overall compliance costs, such costs could be disproportionately burdensome for smaller reporting companies and emerging growth companies. In this case, the proposed rules could give rise to competitive disadvantages for these smaller issuers and could provide incentive for these issuers to consider exiting public capital markets to avoid reporting requirements (possibly incurring a higher cost of capital and potentially limited access to capital in the future). We estimate that approximately 50% of affected issuers are smaller reporting companies and approximately 6% of affected issuers are

emerging growth companies.<sup>396</sup> Given the transparency goals of the statute and the fact that smaller issuers constitute a significant portion of the public reporting companies making resource extraction payments, exempting these issuers from the proposed rules could significantly diminish the expected benefits of the required disclosure. To help us better understand the potential impact of the proposed rules on smaller issuers, we are soliciting comment on the degree to which compliance costs are likely to vary by issuer size and complexity of operations and our overall approach to estimating these costs, as outlined above.

*c. Indirect Costs and Competitive Effects*

In addition to direct compliance costs, we anticipate that the statute could result in significant indirect effects. Issuers that have a reporting obligation under Section 13(q) could have a competitive disadvantage compared to private companies and foreign companies that are not subject to the reporting requirements of the United States federal securities laws and therefore do not have such an obligation. For example, such competitive disadvantage could result from, among other things, any preference by the government of the host country to avoid disclosure of covered payment information, or any ability of market participants to use the information disclosed by reporting issuers to derive contract terms, reserve data, or other confidential information.

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<sup>396</sup> As discussed in this section above, our estimate of the number of affected issuers already excludes 138 issuers whose reported revenues and net cash flows from investing activities suggest that they are unlikely to make payments above the proposed de minimis threshold. If we apply a significantly higher threshold (\$250,000, \$500,000, \$750,000, or \$1,000,000) to revenues and cash flows from investing to estimate the number of such issuers, we would exclude a slightly higher number of issuers from our cost estimates (169, 201, 214, or 227, respectively). Nonetheless, for the reasons described above, we believe that we have proposed to set the de minimis threshold at an appropriate level. See Section II.C.2 above.

Industry commenters have stated that confidential production and reserve data can be derived by competitors or other interested persons with industry knowledge by extrapolating from the payment information required to be disclosed.<sup>397</sup> Other commenters have argued, however, that such extrapolation is not possible, and that information of the type required to be disclosed by Section 13(q) would not confer a competitive advantage on industry participants not subject to such disclosure requirements.<sup>398</sup> In either event, any competitive impact of Section 13(q) should be minimal in those jurisdictions in which payment information of the types covered by Section 13(q) is already publicly available.<sup>399</sup> In addition, any competitive impact should be substantially reduced to the extent that other jurisdictions, such as the European Union and Canada, have adopted laws that require disclosure similar to the disclosure required by Section 13(q) and the proposed rules.<sup>400</sup> We note, however, that to the extent that commenters are accurate in their assessment of competitive effects arising from such disclosure requirements, some U.S. issuers that would not be subject to the EU Directives or other international disclosure regimes might lose some of their competitive advantage from not being obligated to disclose their resource extraction payments.

To the extent that the requirement to disclose payment information does impose a competitive disadvantage on an issuer, such issuer possibly could be motivated to sell assets

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<sup>397</sup> See letters from API 1; ExxonMobil 1; and RDS 2.

<sup>398</sup> See letters from PWYP 1 and Oxfam 1.

<sup>399</sup> In this regard, we note that one commenter provided several examples of countries in which payments are publicly disclosed on a lease or concession level. See letter from PWYP 3.

<sup>400</sup> One commenter suggested that if both the United States and European Union implement disclosure requirements regarding payments to governments “around 90% of the world’s extractive companies will be covered by the rules.” See letter from Arlene McCarthy (Aug. 10, 2012) (Ms. McCarthy is a member of the European Parliament and the parliamentary draftsman on the EU transparency rules for the extractive sector).

affected by such competitive disadvantage at a price that does not fully reflect the value of such assets absent such competitive impact.<sup>401</sup> Additionally, resource extraction issuers operating in countries which prohibit, or could in the future prohibit, the disclosure required under the proposed rules could bear substantial costs.<sup>402</sup> One commenter noted that tens of billions of dollars of capital investments could potentially be put at risk if issuers were required to disclose, pursuant to our proposed rules, information prohibited by the host country's laws or regulations.<sup>403</sup> As explained above, pursuant to our existing Exchange Act authority, the Commission will consider requests for exemptive relief on a case-by-case basis and may grant such relief, if and when warranted. The economic implications of providing such relief are discussed below in Section III.C.1.

Addressing other potential costs, one commenter referred to a potential economic loss borne by shareholders, without quantifying such loss, which the commenter believed could result from highly disaggregated public disclosure of competitively sensitive information causing competitive harm.<sup>404</sup> The commenter also noted resource extraction issuers could suffer competitive harm because they could be excluded from many future projects altogether. One

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<sup>401</sup> For example, a study on divestitures of assets find that issuers that undertake voluntary divestitures have positive stock price reactions, but also finds that issuers forced to divest assets due to action undertaken by the antitrust authorities suffer a decrease in shareholder value. See Kenneth J. Boudreaux, "Divestiture and Share Price." *Journal of Financial and Quantitative Analysis* 10 (Sept. 1975), 619–26. See also, G. Hite and J. Owers. "Security Price Reactions around Corporate Spin-Off Announcements." *Journal of Financial Economics* 12 (Dec. 1983), 409–36 (finding that issuers spinning off assets because of legal/regulatory difficulties experience negative stock returns).

<sup>402</sup> See 2012 Adopting Release, nn.52-53 and accompanying text.

<sup>403</sup> See letter from RDS 4.

<sup>404</sup> See letter from API 1.

commenter also noted that because energy underlies every aspect of the economy, these negative impacts could potentially have repercussions well beyond resource extraction issuers.<sup>405</sup>

Some commenters suggested that we permit issuers to submit payment data confidentially to the Commission and make public only an aggregated compilation of the information.<sup>406</sup> The commenters suggesting that the Commission make public only a compilation of information stated that such an approach would address many of their concerns about the disclosure of commercially sensitive or legally prohibited information and would significantly mitigate the costs of the mandatory disclosure under Section 13(q). As noted above, we did not permit confidential submissions in the 2012 Rules, and the current proposed rules are generally consistent with that approach. As a result, the proposed rules require public disclosure of the information. We note that in situations involving more than one payment, the information would be aggregated by payment type, government, and/or project, which may limit the ability of competitors to use the publicly disclosed information to their advantage. In addition, as discussed above, the Commission will consider applications for exemptive relief from the proposed disclosure requirements on a case-by-case basis and may grant such relief, if and when warranted.<sup>407</sup>

As noted above, the cost of compliance for this provision would be primarily borne by the issuer thus potentially diverting capital away from other productive opportunities which may

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<sup>405</sup> See letter from API 1.

<sup>406</sup> See note 242 above and accompanying text.

<sup>407</sup> See Section II.G.3 above.

result in a loss of allocative efficiency.<sup>408</sup> Such effects may be partially offset over time if increased transparency of resource extraction payments reduces corrupt practices by governments of resource-rich countries and in turn helps promote improved economic development and higher economic growth in those countries. In this regard, as we noted above in Section III.B.1, a number of economic studies have shown that reducing corruption can help promote higher economic growth through more private investments, better deployment of human capital, and political stability.<sup>409</sup>

### **C. Potential Effects Resulting from Specific Implementation Choices**

As discussed in detail in Section II, we have revised the rules from the 2010 Proposing Release and the 2012 Adopting Release to address matters identified in the U.S. District Court for the District of Columbia's decision in the API Lawsuit. In developing the proposed rules, we have also considered relevant international developments, input from staff consultations with other U.S. Government agencies, and the public comments that we have received. We discuss below the significant choices that we are proposing to implement the statute and the associated benefits and costs of those choices. We are unable to quantify the impact of each of the proposals we discuss below with any precision because reliable, empirical evidence about the effects is not readily available to the Commission. We do, however, request that commenters provide us with any empirical evidence relating to these various choices to the extent that they can.

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<sup>408</sup> See letter from Chevron. See also letter from Chairman Bachus and Chairman Miller. As discussed above in note 381, there is some uncertainty regarding who would bear the ultimate costs of compliance. Regardless of who bears the majority of the compliance costs, we believe that the effects on allocative efficiency and capital flows would likely be similar.

<sup>409</sup> See note 336 above and accompanying text.

## 1. Exemption from Compliance

Absent potential exemptive relief, resource extraction issuers operating in countries which prohibit, or may in the future prohibit, the disclosure required under Section 13(q) could bear substantial costs.<sup>410</sup> Such costs could arise if issuers have to choose between ceasing operations in certain countries or violating local law, or if the country's laws have the effect of preventing them from participating in future projects. Some commenters asserted that four countries currently have such laws.<sup>411</sup> Other commenters disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information.<sup>412</sup>

A foreign private issuer with operations in a country that prohibits disclosure of covered payments, or a foreign issuer that is domiciled in such country, might face different types of costs. For example, it might decide it is necessary to delist from an exchange in the United States, deregister, and cease reporting with the Commission,<sup>413</sup> thus incurring a higher cost of capital and potentially limited access to capital in the future. Shareholders, including U.S. shareholders, might in turn suffer an economic and informational loss if an issuer decides it is necessary to deregister and cease reporting under the Exchange Act in the United States as a result of the proposed rules.

Affected issuers also could suffer substantial losses if they have to terminate their operations and redeploy or dispose of their assets in the host country under consideration. These losses would be magnified if an issuer cannot redeploy the assets in question easily, or it has to

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<sup>410</sup> See 2012 Adopting Release, nn.52-53 and accompanying text.

<sup>411</sup> See letters from API 1 and ExxonMobil 1 (mentioning Angola, Cameroon, China, and Qatar). See also letter from RDS 2 (mentioning Cameroon, China, and Qatar).

<sup>412</sup> See, e.g., letters from ERI 3; Global Witness 1; OpenOil; PWYP 1; PWYP 3; and Rep. Frank et al.

<sup>413</sup> See letter from Berns.

sell them at a steep discount (a fire sale). Even if the assets could be easily redeployed, an issuer could suffer opportunity costs if they are redeployed to projects with inferior rates of return. In the 2012 Adopting Release we estimated that such losses could amount to billions of dollars.

A number of factors may serve to mitigate the costs and competitive burdens arising from the impact of foreign laws on the required disclosure. For example, the widening global influence of the EITI and the recent trend of other jurisdictions to promote transparency, including listing requirements adopted by the Hong Kong Stock Exchange and the requirements adopted pursuant to the EU Directives and ESTMA, may discourage governments in resource-rich countries from rigorously enforcing any such prohibitions or from adopting new prohibitions on payment disclosure.<sup>414</sup> Resource extraction issuers concerned that disclosure required by Section 13(q) may be prohibited in a given host country may also be able to seek authorization from the host country to disclose such information.<sup>415</sup> Commenters did not provide estimates of the cost that might be incurred to seek such an authorization.

In addition, these potential costs could be substantially mitigated under our proposed rules. We intend to consider using our existing authority under the Exchange Act to provide exemptive relief on a case-by-case basis, if and when warranted, upon the request of a resource

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<sup>414</sup> See 2012 Adopting Release, n.15 and n.48, and the discussion in Section I above.

<sup>415</sup> For example, according to some commenters, the Minister of Petroleum may provide formal authorization for the disclosure of information about a reporting issuer's activities in Angola. See letter from ExxonMobil 2. See also letter from PWYP 2 ("Current corporate practice suggests that the Angolan government regularly provides this authorization. For instance, Statoil regularly reports payments made to the Angolan government." (internal citations omitted)). The legal opinions submitted by Royal Dutch Shell with its comment letter also indicate that disclosure of otherwise restricted information may be authorized by government authorities in Cameroon and China, respectively. See letter from RDS 2.

extraction issuer.<sup>416</sup> As mentioned above, we believe that a case-by-case approach to exemptive relief using our existing authority is preferable to either including within the final rules a blanket exemption for a foreign law prohibition (or for any other reason) or providing no exemptions and no avenue for exemptive relief under this or other circumstances. The proposed approach should significantly decrease compliance and economic costs to the extent that issuers are able to demonstrate that an exemption where host country laws prohibit disclosure is warranted. Indeed, assuming such laws exist and are enforced and that issuers are able to make the required demonstration for an exemption to our proposed rules, this approach could potentially save affected issuers billions of dollars in compliance and economic costs.<sup>417</sup>

An alternative to using our exemptive authority on a case-by-case basis would be to provide a blanket or per se exemption where specific countries have a law prohibiting the required disclosure. Although a blanket exemption would reduce potential economic costs (e.g., costs of relocating assets) and compliance costs (e.g., costs associated with applying for the exemption) for affected issuers, it could create a stronger incentive for host countries that want to prevent transparency to pass laws that prohibit such disclosure, potentially undermining the purpose of Section 13(q) to compel disclosure in foreign countries that have failed to voluntarily do so.<sup>418</sup> It also would remove any incentive for issuers to diligently negotiate with host

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<sup>416</sup> For example, an issuer would be able to request exemptive relief in situations where the required payment disclosure is prohibited under the host country's laws. See discussion in Section II.G.3 above.

<sup>417</sup> We note, however, that in addition to reducing costs, granting an exemption might diminish some of the benefits of enhanced transparency as well.

<sup>418</sup> See, e.g., 156 CONG. REC. S3815 (May 17, 2010) (Statement of Senator Cardin) (“We currently have a voluntary international standard for promoting transparency. . . . But too many countries and too many companies remain outside this voluntary system.”). We also note that a blanket exemption would incentivize host countries that want to prevent transparency to enact laws prohibiting the disclosure without suffering the

countries for permission to make the required disclosures. Furthermore, it would make it more difficult to address any material changes over time in the laws of the relevant foreign countries, thereby resulting in an outdated blanket exemption. By contrast, the tailored case-by-case exemptive approach we are contemplating would provide a more flexible and targeted mechanism for the Commission to address potential cost concerns without creating incentives for host countries to enact laws prohibiting disclosure to the extent that the exemptive relief is not universally granted.

Finally, we believe that the more tailored case-by-case exemptive approach that we are proposing could improve the comparability of payment information among resource extraction issuers and across countries. As such, it may increase the benefit to users of the Section 13(q) disclosure. Also, although not providing a blanket exemption could encourage issuers to not list on U.S. markets, to the extent that other jurisdictions are developing and adopting similar initiatives (e.g., the EU and Canada), the advantage to those issuers from not being subject to the proposed rules will diminish.

As discussed above, host country laws that prohibit the type of disclosure required under the proposed rules could lead to significant additional economic costs that are not captured by the compliance cost estimates in Section III.B.2.b. We believe that affording exemptive relief from the proposed disclosure requirements on a case-by-case basis, as circumstances warrant, should substantially mitigate such costs. However, we acknowledge that, if this relief were not provided, issuers could potentially incur costs associated with the conflict between our

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cost of decreasing the number of potential bidders on – and competition for – projects within their jurisdictions, and thus without the cost of decreasing the potential value realized to the host country from awarding a contract.

requirements and those foreign law prohibitions. Below, we have attempted, to the extent possible, to assess the magnitude of those potential costs if exemptive relief were not granted.

We base our analysis on the four countries that some commenters claimed have versions of such laws.<sup>419</sup> We searched (through a text search in the EDGAR system) the Forms 10-K, 40-F, and 20-F of affected issuers for year 2014 for any mention of Angola, Cameroon, China, or Qatar. We found that, out of 471 potentially affected issuers, 163 mentioned one of these four countries. However, only 49 of them described any activity in one of these four countries and 114 mentioned these countries for other, unrelated reasons. An examination of these 49 filings indicates that most filings did not provide detailed information on the extent of issuers' operations in these countries.<sup>420</sup> Thus, we are unable to determine the total amount of capital that could be lost in these countries if the information required to be disclosed under the proposed rules is, in fact, prohibited by laws or regulations and exemptive relief is not provided.

We can, however, assess if the costs of withdrawing from these four countries are in line with one commenter's estimate of tens of billions of dollars.<sup>421</sup> To do this, we first estimate the market value of assets that an issuer currently owns in a country with such laws. We then discuss how the presence of various opportunities for the use of those assets by the issuer or another entity would affect the size of the issuer's potential losses. We also discuss how these

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<sup>419</sup> See letters from API 1 and ExxonMobil 1 (mentioning Angola, Cameroon, China, and Qatar); see also letter from RDS 2 (mentioning Cameroon, China, and Qatar). Other commenters disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information. See, e.g., letters from ERI 3; Global Witness 1; PWYP 1; PWYP 3; and Rep. Frank et al.

<sup>420</sup> We note that some resource extraction issuers do not operate in those four countries and thus would not have any such information to disclose. Other issuers may have determined that they were not required to provide detailed information in their filings regarding their operations in those countries.

<sup>421</sup> See letter from RDS 4.

losses would be affected if an issuer cannot redeploy the assets in question easily, or it has to sell them with a steep discount (a fire sale). In order to estimate the market value of assets located in one of these countries, we use Compustat geographic segments data extracted from annual reports to find the fraction of book value of such assets in the issuer's total assets and assume that the market value of such assets is the same fraction of the issuer's total market value.<sup>422</sup>

As we discuss above, we were able to identify a total of 49 issuers that mentioned that they are active in these countries (some operate in more than one country). The table below provides information from the 20 issuers, out of the 49 described above, that provide geographic segment data detailed at the country level and that specifically identify the value of assets in one of these four countries.<sup>423</sup> We expect that the actions in response to the foreign law prohibition and the nature of costs that issuers might face would be different for issuers domiciled in the United States and in foreign jurisdictions; therefore, we consider these two types of filers separately.

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<sup>422</sup> This approach assumes that valuation of assets of a firm is the same regardless of where these assets are geographically located. Not all of the assets located in these host countries might be related to resource extraction payments, which disclosure can trigger their sale or loss; however, we choose the conservative approach and err on the side of overestimating the losses.

<sup>423</sup> As noted above, we identified 49 issuers that discussed their activities in at least one of the four countries, but only 20 of the issuers provided country-level geographic segment information for those countries that was specific enough to use in our analysis (some issuers may have determined that they were not required to provide detailed information in their filings and others might not have any assets in these countries). In the table, Country Assets are defined as either Long-lived Assets, Identifiable Total Assets, or Property, Plant & Equipment, whichever was disclosed; Country Assets Fraction in Total Assets is Country Assets/Total Assets; and Market Value Estimate of Country Assets is Country Assets Fraction in Total Assets \* Company Market Value, where Company Market Value is calculated as Consolidated Company-Level Market Value of Common Equity + Total Debt + Preferred Stock Liquidating Value – Deferred Taxes and Investment Tax Credits if all these values were available. For some issuers we were not able to identify their company-level market values, and, thus, we were not able to determine their Market Value Estimate of Country Assets. All Compustat data is the latest annual data disclosed on or before the date of the company's 2014 Form 10-K or 20-F filing.

Issuer	Form Type	Domicile (Business Address)	Host Country	Country Assets (\$ mil)	Total Assets (\$ mil)	Country Assets Fraction in Total Assets	Market Value Estimate of Country Assets (\$ mil)
1	10-K	Foreign	China	23.2	23.2	100.0%	
2	10-K	Foreign	China	309.2	309.2	100.0%	93.8
3	10-K	Foreign	China	195.9	195.9	100.0%	75.8
4	10-K	Foreign	China	25.1	25.1	100.0%	19.5
5	10-K	Foreign	China	17.1	17.1	100.0%	91.6
6	20-F	Foreign	China	499.6	499.6	100.0%	82.2
7	20-F	Foreign	China	8,712.2	21,054.6	41.4%	
8	20-F	Foreign	China	276,542.6	386,889.0	71.5%	
9	10-K	U.S.	Angola	8,262.0	346,808.0	2.4%	9,674.4
10	10-K	U.S.	Angola	11.5	308.2	3.7%	14.7
11	10-K	U.S.	Cameroon	166.5	4,507.2	3.7%	168.2
12	10-K	U.S.	China	388.0	35,742.0	1.1%	209.5
13	10-K	U.S.	China	355.0	4,084.0	8.7%	369.9
14	10-K	U.S.	China	542.0	9,321.0	5.8%	343.5
15	10-K	U.S.	China	125.1	125.1	100.0%	46.9
16	10-K	U.S.	China	96.5	96.5	100.0%	1.5
17	10-K	U.S.	China	2,143.0	118,057.0	1.8%	1,689.2
18	10-K	U.S.	China	15.0	845.2	1.8%	28.8
19	10-K	U.S.	China	53.1	3,006.8	1.8%	50.4
20	10-K	U.S.	Qatar	2,605.0	69,443.0	3.8%	2,830.0

The magnitude of potential total loss of assets in the host countries is represented in the last column of the table, the estimated market value of country assets. For the 12 issuers domiciled in the United States that have assets in one of these four host countries, the estimated total loss range is between \$1.5 million and \$9.7 billion, with a median loss of \$188.8 million. The aggregate fraction of total assets that might be affected is 2.5%.<sup>424</sup> We note that these estimates apply only to issuers that have assets in one of the host countries.

<sup>424</sup> Total assets of all U.S.-based firms located in these host countries divided by total worldwide assets of the same firms.

As shown in the table above, eight issuers have a foreign address associated with their Form 10-K or 20-F filing. As we discussed above, issuers that are domiciled in foreign countries might face different types of costs. For example, they are more likely to decide it is necessary to delist from an exchange in the United States, deregister, and cease reporting with the Commission, thus incurring a higher cost of capital and potentially limited access to capital in the future, rather than to sell their assets abroad. Due to limited data availability, we cannot reliably quantify these costs.

Even though our analysis was limited to less than half of issuers that are active in these four countries, these estimates suggest that commenters' concerns about such host country laws potentially adding billions of dollars of costs to affected issuers could be warranted. Additional costs at that scale could have a significant impact on resource extraction issuers' profitability and competitive position. The analysis above assumes that a total loss of assets located in the host countries would occur. In a more likely scenario, however, these issuers would be forced to sell their assets in the above-mentioned host countries at fire sale prices. While we do not have data on fire sale prices for the industries of the affected issuers, economic studies on fire sales of real assets in other industries could provide some estimates to allow us to quantify the potential costs to affected issuers from having to sell assets at fire sale prices. For example, a study on the airline industry finds that planes sold by financially distressed airlines bring 10 to 20 percent lower prices than those sold by undistressed airlines.<sup>425</sup> Another study on aerospace plant closings finds that all groups of equipment sold for significant discounts relative to estimated

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<sup>425</sup> See Todd Pulvino 1998. "Do Fire-Sales Exist? An Empirical Study of Commercial Aircraft Transactions." *Journal of Finance*, 53(3): 939–78.

replacement cost.<sup>426</sup> The discounts on machine tools, instruments, and miscellaneous equipment were estimated to be between 63 and 69 percent. The analysis also suggests that the most specialized equipment appears to have suffered substantially higher discounts than the least specialized equipment, which may be relevant to the extractive industry to the extent that a project would not have many potential alternative suitors should it need to be disposed of due to a conflict between the proposed rules and foreign laws. Other studies provide estimates of fire sale discounts for forced house sales (about 3–7 percent for forced sales due to death or bankruptcy and about 27 percent for foreclosures)<sup>427</sup> and sales of stand-alone private firms and subsidiaries (15–30 percent relative to comparable public acquisition targets).<sup>428</sup> These estimates suggest a possible range for the fire sale discount from 3 to 69 percent.

To understand how relevant these discounts are to the resource extraction issuers affected by the rule, we examine the ease with which real assets could be disposed of in different industries. If the forced disposal of real assets is more easily facilitated in the resource extraction industries compared to other industries (*i.e.*, there is a more liquid market for those assets), then the lower range of the fire sale discounts will be more appropriate to estimate potential losses due to the foreign law prohibitions. We measure the ease with which issuers in a given industry could sell their assets by a liquidity index.<sup>429</sup> The index is defined as the ratio of the value of

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<sup>426</sup> See Ramey, V.A., Shapiro, M.D. 2001. “Displaced Capital: A Study of Aerospace Plant Closings.” *Journal of Political Economy*, 109: 958–92.

<sup>427</sup> See Campbell, John Y., Stefano Giglio, and Parag Pathak 2011. “Forced Sales and House Prices.” *American Economic Review*, 101: 2108–31.

<sup>428</sup> See Officer, M.S. 2007. “The Price of Corporate Liquidity: Acquisition Discounts for Unlisted Targets.” *Journal of Financial Economics*, 83: 571–98.

<sup>429</sup> See Frederic Schlingemann, Rene Stulz, and Ralph Walkling 2002. “Divestitures and the Liquidity of the Market for Corporate Assets.” *Journal of Financial Economics*, 64: 117–144. The index value is between 0 and 1. A higher value of the index for an industry indicates that this is an industry with a more liquid market for

corporate control transactions<sup>430</sup> in a given year to the total book value of assets of firms in the industry for that year. We believe that this ratio captures the general liquidity of assets in an industry because it measures the volume of the type of transactions that companies rely on when divesting real assets. Additionally, one economic study finds that the liquidity of the market for corporate assets, as measured by the liquidity index, plays an important role in explaining assets disposals by companies.<sup>431</sup>

We note, however, that the index, as constructed, will also reflect the industry's typical financial leverage, not just the liquidity of its assets. To the extent that different industries have different leverages, these differences in leverage could explain some of the cross-industry variation of the index. Additionally, the index measures the ease with which ownership of assets is changed over the time period under consideration. Hence, the index is expected to adjust to intertemporal changes in the ease with which assets in a certain industry can be disposed of, which is important because it is well-established that control transactions tend to be cyclical in nature.<sup>432</sup>

We construct the index for all industries, identified by three-digit SIC codes. For each industry, after estimating the value of the index in each year during the period 2010–2014, we

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corporate assets and a firm in that industry would be able to sell its real assets easier and at smaller loss than a firm in an industry with a lower liquidity index.

<sup>430</sup> As corporate control transactions, we consider all completed or pending leveraged buyouts, tender offers, spinoffs, exchange offers, minority stake purchases, acquisitions of remaining interest, privatizations, and equity carve-outs of U.S. targets. We exclude buybacks (e.g., repurchases and self-tenders) from the sample. Data on these transactions comes from Thomson Financial's Mergers & Acquisitions and New Issues databases. Data on the book value of total assets is taken from Compustat.

<sup>431</sup> See Frederic Schlingemann, Rene Stulz, and Ralph Walkling 2002. "Divestitures and the Liquidity of the Market for Corporate Assets." *Journal of Financial Economics*, 64: 117–144.

<sup>432</sup> Gregor Andrade, and Erik Stafford, 2004. "Investigating the economic role of mergers." *Journal of Corporate Finance* 10: 1-36.

calculate the average over the five year period. Several industries have a liquidity index greater than 1; in those cases we cap the index level at 1.

The table below presents summary statistics for the liquidity index for all industries and the resource extraction industries during the period 2010–2014.

	<b>Index value</b>
<u><i>All other industries</i></u>	
Mean	0.11
Median	0.03
Top quartile	0.09
Bottom quartile	0.01
<u><i>Industries with similar financial leverage</i></u>	
Mean	0.08
Median	0.02
Top quartile	0.10
Bottom quartile	0.01
<u><i>Resource extraction issuers</i></u>	
Mean	0.02
Median	0.01

The results in the table show that the liquidity of real assets in the resource extraction industries is low (an average liquidity index of 0.02) compared with the liquidity in other industries (an average liquidity index of 0.11). That is, it is harder to dispose of assets in the extractive industries relative to other industries. In fact, the liquidity index of resource extraction industries is in the lowest quartile of the distribution of the index for all industries. As mentioned above, this could reflect the fact that resource issuers have higher financial leverage than other industries. All other things being equal, higher financial leverage will result in a lower liquidity index. To control for the effects of financial leverage, we compare the liquidity

index of resource extraction industries to that of industries with similar leverage.<sup>433</sup> As the results of this comparison show, resource extraction industries have lower liquidity index values even when compared to industries with similar levels of financial leverage: a median of 0.01 for the resource extraction industries compared to a median of 0.02 for industries with similar financial leverage.<sup>434</sup> This suggests that affected issuers may still experience difficulty in disposing of some of their real assets relative to other industries with similar leverage levels when a need arises. It should be noted, however, that the liquidity index estimates the liquidity of the real assets at the industry level, not at the level of a country with disclosure prohibition laws. It is possible that in some of these countries the ability of an affected issuer to dispose of assets could be more or less constrained than that at the industry level.

Because we lack data to construct the liquidity index at the country level, we cannot quantify the liquidity of the single-country market for real assets. The table below lists the number of corporate control transactions in each of the four countries under consideration from 2010 through 2014, broken down by type of industry.<sup>435</sup> As seen from the table, China is by far the most active market for corporate control transactions among the four countries, although on a

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<sup>433</sup> We first estimate the median market leverage of the resource extraction industries during the period 2010–2014. Market leverage is defined as the ratio Total debt / (Total debt + Market value of equity). We then classify as similar those industries whose median market leverage that is within  $-/+ 10\%$  of the median market leverage of the resource industries for the same time period. There are six industries that are similar to the resource extraction industries based on this criterion. Data on total debt and market value of equity comes from Compustat.

<sup>434</sup> We note that many factors may drive the choice of leverage within a given industry, and some of these factors may also affect the industry's liquidity index. Thus, the industries that have leverage that is similar to that of the resource extraction industries may be very different in some other aspects (e.g., growth opportunities or intensity of competition) and that could explain the differences in their liquidity indices and the liquidity index of the resource extraction industries.

<sup>435</sup> Corporate control transactions are defined as in footnote 430. Data on the transactions comes from Thomson Financial's Mergers & Acquisitions.

percentage basis more deals involving resource extraction industries occur in Angola, Cameroon, and Qatar. Although the number of relevant transactions gives some indication of how liquid the market in each country is, without knowing the size of the discounts and the types of companies involved in these deals (e.g., small or large) we cannot conclusively say in which country the cost associated with fire sale prices would be lower. These costs would likely depend on country-level factors such as a country's regulatory framework governing such transactions (e.g., how quickly a transaction can get approved), the degree of competition in the resource extraction industry, availability of capital (e.g., availability and cost of debt and stock market valuations), and changes in currency exchange rates. For example, a recent study documents that companies from countries whose stock market has increased in value and whose currency has recently appreciated are more likely to be purchasers of corporate assets.<sup>436</sup> In a certain country, a more competitive resource extraction industry is likely to be associated with lower fire sale discounts.

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<sup>436</sup> See Isil Erel, Rose Liao, and Michael Weisbach 2012. "Determinants of Cross-Border Mergers and Acquisitions," *Journal of Finance* 67: 1045-82.

<b>Country</b>	<b>Number of transactions (% of all transactions)</b>
<u>Angola</u>	
Resource extraction industries	6 (54%)
All other industries	7 (46%)
<u>Cameroon</u>	
Resource extraction industries	10 (63%)
All other industries	6 (37%)
<u>China</u>	
Resource extraction industries	885 (6%)
All other industries	14,304 (94%)
<u>Qatar</u>	
Resource extraction industries	5 (8%)
All other industries	54 (92%)

Given the lower liquidity of the market for the real assets of resource extraction issuers, we believe that the upper limit of the fire sale discount range would be more appropriate when estimating the fire sale prices at which affected issuers could dispose of their assets in countries with disclosure prohibition laws, should such need arise. If we apply those discount percentages to the market value of the issuers' assets in these host countries, this would reduce our estimates of their potential losses. For the U.S.-based issuers, if we apply the highest discount of 69 percent, the range of losses would be between \$1 million and \$6.7 billion, with a median loss of \$130.3 million. If the true fire sale discounts in the countries with disclosure prohibition laws are lower than our highest estimate, the losses of affected issuers would be lower. In addition to the dollar costs, the process of disposing of assets could involve substantial time, which could further increase the total cost of the restructuring. We acknowledge, however, that the fire sale discount estimates are based on data from other industries that are very different from the

industries of affected issuers. Thus, our estimates may not accurately reflect the true fire sale discounts that affected issuers could face.

Alternatively, an issuer could redeploy these assets to other projects that would generate cash flows. If an issuer could redeploy these assets relatively quickly and without a significant cost to projects that generate similar rates of returns as those in the above-mentioned countries, then the issuer's loss from the presence of such host country laws would be minimal. The more difficult and costly it is for an issuer to do so, and the more difficult it is to find other projects with similar rates of return, the larger the issuer's losses would be. However, we do not have enough data to quantify more precisely the potential losses of issuers under those various circumstances. Likewise, if there are multiple potential buyers (e.g., companies not subject to the proposed rules, the EU Directives, or ESTMA), and if the issuer could sell those assets to one of such buyers, then the buyer might pay the fair market value for those assets, resulting in minimal to no loss for the issuer.

Overall, the results of our analysis are consistent with commenters' assertions that the presence of host country laws that prohibit the type of disclosure required under the proposed rules could be costly, although, as mentioned in the above paragraph, in some instances there may be mitigating factors that could decrease those costs. It is also possible that under certain circumstances affected issuers could lose 100% of their assets in a given country. The size of the potential loss to issuers would depend on the presence of other similar opportunities, third parties willing to buy the assets at fair-market values in the above-mentioned host countries, and the ability of issuers to avoid fire sales of these assets. Finally, as we discussed above at the beginning of this section, a number of other factors should substantially mitigate the competitive

burdens arising from the required disclosure, including our intent to consider exemptive relief on a case-by-case basis.

## **2. Alternative Reporting**

In a change from the 2012 Adopting Release, the proposed rules would allow resource extraction issuers subject to a foreign jurisdiction's resource extraction payment disclosure requirements that we have determined are substantially similar to our requirements to satisfy their filing obligations by filing the report required by that foreign jurisdiction with the Commission. This proposed approach would decrease the compliance costs for issuers that are cross-listed or incorporated in a foreign jurisdiction and have to satisfy at least one similar foreign disclosure requirement. Those issuers would save on compliance costs associated with filing a Form SD pursuant to Section 13(q). We estimated above that approximately 268 issuers would be subject to other regulatory regimes that may allow them to utilize the proposed provision.<sup>437</sup>

As an alternative, we could have decided not to propose such a provision. Such an alternative would have increased the compliance costs for issuers that are subject to similar foreign disclosure requirements. These issuers would have to comply with multiple disclosure regimes and bear compliance costs for each regime, although it is possible that the marginal costs for complying with an additional disclosure regime would not be high given the potential similarities that may exist between these reporting regimes and the final rules that we may adopt.

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<sup>437</sup> These are issuers that have a business address, are incorporated, or are listed on markets in the EEA or Canada and that have to provide similar disclosure to the European or Canadian authorities.

### 3. Definition of Control

Section 13(q) requires resource extraction issuers to disclose payments made by a subsidiary or entity under the control of the issuer. As discussed above in Section II.D above, we are proposing rules that would define the term “control” based on accounting principles. Alternatively, we could have used a definition based on Exchange Act Rule 12b-2 as in the 2012 Rules.<sup>438</sup> We believe that the approach we are proposing would be less costly for issuers to comply with because issuers are currently required to apply the definition on at least an annual basis for financial reporting purposes. Using a definition based on Rule 12b-2 would require issuers to undertake an additional process to the one currently required for financial reporting purposes.<sup>439</sup> In addition, there are several other benefits from using the proposed definition based on accounting principles. There would be audited financial statement disclosure of an issuer’s significant consolidation accounting policies in the footnotes to its audited financial statements contained in its Exchange Act annual reports, and an issuer’s determination of control under the proposed rules would be subject to the audit process as well as subject to the internal accounting controls that issuers are required to have in place with respect to reporting audited financial statements filed with the Commission.<sup>440</sup> All of these benefits may lead to more accurate, reliable, and consistent reporting of subsidiary payments, therefore, enhancing the quality of the reported data.

Under the definition we adopted in the 2012 Rules, a resource extraction issuer would have been required to make a factual determination as to whether it has control of an entity based

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<sup>438</sup> See note 175 above and accompanying text.

<sup>439</sup> See note 179 above and accompanying text.

<sup>440</sup> See Section II.D above.

on a consideration of all relevant facts and circumstances. This alternative would have required issuers to engage in a separate analysis of which entities are included within the scope of the required disclosures (apart from the consolidation determinations made for financial reporting purposes) and could have increased the compliance costs for issuers compared to the approach we are proposing.

#### **4. Definition of “Commercial Development of Oil, Natural Gas, or Minerals”**

As in the 2012 Rules, the proposed rules define “commercial development of oil, natural gas, or minerals” to include exploration, extraction, processing, and export, or the acquisition of a license for any such activity. As described above, the rules that we are proposing generally track the language in the statute. We are sensitive to the fact that a broader definition of “commercial development of oil, natural gas, or minerals” could increase issuers’ costs. We are also sensitive to the fact that expanding the definition in a way that is broader than other reporting regimes could potentially lead to a competitive disadvantage for those issuers covered only by our proposed rules. Further, we recognize that limiting the definition to these specified activities could potentially negatively affect those using the payment information if disclosure about payments made for activities not included in the list of specified activities, such as refining, smelting, marketing, or stand-alone transportation services (that is, transportation that is not otherwise related to export), would be useful to users of the information.

As noted above, to promote the transparency goals of Section 13(q), the proposed rules include an anti-evasion provision that requires disclosure with respect to an activity or payment that, although not in form or characterization one of the categories specified under the proposed

rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).<sup>441</sup> We recognize that adding this requirement may increase the compliance costs for some issuers; however, we believe this provision is appropriate in order to minimize evasion and improve the effectiveness of the disclosure.

In response to commenters' request for clarification of the activities covered by the proposed rules, we also are providing guidance about the activities covered by the terms "extraction," "processing," and "export." The guidance should reduce uncertainty about the scope of the activities that give rise to disclosure obligations under Section 13(q) and the related rules, and therefore should facilitate compliance and help lessen the costs associated with the disclosure requirements.

## **5. Types of Payments**

As in the 2012 Rules, the proposed rules would add two categories of payments to the list of payment types identified in the statute that must be disclosed: dividends and payments for infrastructure improvements. We include these payment types in the proposed rules because, based on the comments we have received, we believe they are part of the commonly recognized revenue stream. For example, payments for infrastructure improvements have been required under the EITI since 2011. Additionally, we note that the EU Directives and ESTMA also require only these payment types to be disclosed. Thus, including dividends and payments for infrastructure improvements (e.g., building a road) in the list of payment types required to be disclosed under the proposed rules would promote consistency with the EU Directives and ESTMA and should improve the effectiveness of the disclosure, thereby furthering international

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<sup>441</sup> See proposed Rule 13q-1(b).

transparency promotion efforts. Including dividends and payments for infrastructure improvements also could help alleviate competitiveness concerns by potentially imposing disclosure requirements on a wider range of issuers.

As discussed earlier, under the proposed rules, resource extraction issuers would incur costs to provide the payment disclosure for the payment types identified in the statute. For example, there would be costs to modify the issuers' core enterprise resource planning systems and financial reporting systems so that they can capture and report payment data at the project level, for each type of payment, government payee, and currency of payment.<sup>442</sup> The addition of dividends and payments for infrastructure improvements to the list of payment types for which disclosure is required may marginally increase some issuers' costs of complying with the final rules. For example, issuers may need to add these types of payments to their tracking and reporting systems. We understand that these types of payments are more typical for mineral extraction issuers than for oil issuers,<sup>443</sup> and therefore only a subset of the issuers subject to the final rules might be affected.

The proposed rules do not require disclosure of certain other types of payments, such as social or community payments. We recognize that excluding those payments reduces the overall level of disclosure. We have not, however, proposed requiring disclosure of those payments because we do not believe they are part of the commonly recognized revenue stream for the

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<sup>442</sup> See note 356 and accompanying text.

<sup>443</sup> See, e.g., letters from PWYP 1 and Global Witness 1; see also Chapter 19 "Advancing the EITI in the Mining Sector: Implementation Issues" by Sefton Darby and Kristian Lempa, in Advancing the EITI in the Mining Sector: A Consultation with Stakeholders (EITI 2009).

commercial development of oil, natural gas, or minerals.<sup>444</sup> In addition, by not including these types of payments, the proposed rules avoid potentially imposing additional compliance costs on issuers. We acknowledge that some issuers might characterize some of their payments as social or community payments instead of other types of payment with the intent of avoiding or obfuscating disclosure. To the extent that such characterization is done for the purpose of evading the proposed disclosure requirement, it would be a violation of the anti-evasion provision discussed above.<sup>445</sup> Alternatively, if such payment is genuinely made for the benefit of the local community, it could, in certain circumstances, support the statutory intent of reducing corruption.

Under the proposed rules, issuers may disclose payments that are made for obligations levied at the entity level, such as corporate income taxes, at that level rather than the project level. This accommodation also should help reduce compliance costs for issuers without significantly interfering with the goal of achieving increased payment transparency.

Under the proposed rules, issuers must disclose payments made in-kind. The EU Directives and ESTMA require disclosure of in-kind payments. This requirement is also consistent with the EITI and should help further the goal of supporting international transparency promotion efforts and enhance the effectiveness of the disclosure. At the same time, this requirement could impose costs if issuers have not previously had to value their in-kind

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<sup>444</sup> We note that commenters disagreed on whether such payment types are part of the commonly recognized revenue stream. See 2012 Adopting Release, n.185 and accompanying discussion (citing commenters suggesting that social or community payments constitute part of the commonly recognized revenue stream of resource extraction) and 2012 Adopting Release, n.188 and accompanying discussion (citing commenters maintaining that social or community payments are not part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals). See also Section II.C.1 above.

<sup>445</sup> See note 441 above and accompanying text.

payments. To minimize the potential additional costs, the proposed rules provide issuers with the flexibility of reporting in-kind payments at cost, or if cost is not determinable, at fair market value. We believe this approach could lower the overall compliance costs associated with our decision to include the disclosure of in-kind payments within the proposed rules.

## **6. Definition of “Not De Minimis”**

Section 13(q) requires the disclosure of payments that are “not de minimis,” leaving that term undefined. Consistent with the 2012 Rules, the proposed rules define “not de minimis” to mean any payment, whether made as a single payment or a series of related payments, that equals or exceeds \$100,000, or its equivalent in the issuer’s reporting currency. Although we considered leaving “not de minimis” undefined, we believe that defining this term should help to promote consistency in payment disclosures and reduce uncertainty about what payments must be disclosed under Section 13(q) and the related rules, and therefore should facilitate compliance.<sup>446</sup> As noted above, because the primary purpose of Section 13(q) is to further international transparency efforts for payments to governments for the commercial development of oil, natural gas, or minerals, we believe that whether a payment is “not de minimis” should be considered in relation to a host country. We recognize, however, that issuers may have difficulty assessing the significance of particular payments for particular countries or recipient governments. Therefore, we are proposing a \$100,000 threshold that would provide clear guidance about payments that are “not de minimis” and promote the transparency goals of the statute.

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<sup>446</sup> See 2012 Adopting Release, n.223, n.231, and n.233 and accompanying text.

We considered proposing a definition of “not de minimis” that was based on a qualitative principle or a relative quantitative measure rather than an absolute quantitative standard. We chose the absolute quantitative approach for several reasons. An absolute quantitative approach should promote consistency of disclosure and, in addition, would be easier for issuers to apply than a definition based on either a qualitative principle or relative quantitative measure.<sup>447</sup> Moreover, using an absolute dollar amount threshold for disclosure purposes should reduce compliance costs by reducing the work necessary to determine what payments must be disclosed.

In choosing the \$100,000 “de minimis” threshold, we selected an amount that we believe strikes an appropriate balance in light of varied commenters’ concerns and the purpose of the statute. Although commenters suggested various thresholds,<sup>448</sup> no commenter provided data to assist us in determining an appropriate threshold amount. In addition, our proposed threshold is very similar to the payment thresholds of other resource extraction disclosure laws.<sup>449</sup> For issuers (or their subsidiaries) that are already providing payment information under those resource extraction disclosure laws, our definition of “not de minimis” would likely decrease compliance costs (compared to other threshold choices) associated with determining which payments should be reported because these issuers would already have systems tailored to this threshold. We considered other absolute amounts but chose \$100,000 as the quantitative threshold in the definition of “not de minimis.” We decided not to propose a lower threshold because we are concerned that such an amount could result in undue compliance burdens and raise competitive concerns for many issuers. We also considered defining “not de minimis”

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<sup>447</sup> See 2012 Adopting Release, n.252 and accompanying text.

<sup>448</sup> See 2012 Adopting Release, n.235 and n.243 and accompanying text.

<sup>449</sup> See note 166 above.

either in terms of a materiality standard or by using a larger number, such as \$1,000,000. Both of these might have resulted in lower compliance costs and might have lessened competitive concerns. In determining not to propose these options, however, we were mindful that they could leave important payment streams undisclosed, reducing the potential benefits to be derived from the proposed rule. In short, we believe the \$100,000 threshold strikes an appropriate balance between concerns about the potential compliance burdens of a lower threshold and the need to fulfill the statutory directive for resource extraction issuers to disclose payments that are “not de minimis.”

## **7. Definition of “Project”**

Section 13(q) requires a resource extraction issuer to disclose information about the type and total amount of payments made to a foreign government or the Federal Government for each project relating to the commercial development of oil, natural gas, or minerals, but it does not define the term “project.” As noted above, in a change from the 2012 Rules, the proposed rules define “project” as operational activities governed by a single contract license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government. The definition is based on the definition in the EU Directives and the draft ESTMA definition, but allows for greater flexibility when operational activities governed by multiple legal agreements may be deemed a project.

Compared to the 2012 Rules, the proposed definition of “project” should help reduce costs for issuers listed in both the United States and the European Union or in Canada by not requiring different disaggregation of project-related costs due to different definitions of the term. It also likely would reduce the competitive disadvantage for issuers that could be required to

make more granular disclosure of information than their competitors under a narrower definition. Our proposed approach also would provide more flexibility in, and reduce the burdens associated with, disaggregating payments made for activities that relate to multiple agreements that are both operationally and geographically interconnected.

Our proposed approach may, however, increase the compliance costs for issuers that would be required to implement systems to track payments at a different level of granularity than what they currently track. In a similar vein, it may increase the risk of sensitive contract information being released, thus increasing the likelihood of competitive harm for some affected issuers. At the same time, the ability of issuers to define as a “project” agreements that do not have substantially similar terms may reduce the risk of sensitive information being released.

As an alternative, we could have proposed to leave “project” undefined, as in the 2012 Rules. Leaving the term “project” undefined could have provided issuers more flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates or the issuer’s size. Under such an approach, however, resource extraction issuers could have incurred costs in determining their “projects.” Moreover, leaving the term undefined could result in higher costs for some resource extraction issuers than others if an issuer’s determination of what constitutes a “project” would result in more granular information being disclosed than another issuer’s determination of what constitutes a “project.” In addition, leaving the term “project” undefined may not be as effective in achieving the transparency benefits contemplated by the statute because resource extraction issuers’ determinations of what constitutes a “project” may differ, which could reduce the comparability of disclosure across issuers.

Finally, we could have adopted the API definition of project, which would have defined project-level reporting to allow issuers to combine as one “project” all of the similar extraction activities within a major subnational political jurisdiction. We acknowledge that this aggregated disclosure could potentially impose fewer costs on resource extraction issuers—particularly those issuers with many similar resource extraction activities occurring within a subnational jurisdiction—as the API suggested definition would not require issuers to expend the time and resources necessary to achieve the type of granular reporting that our proposed rules would require.<sup>450</sup> However, as discussed above in Section II.E, we believe that such a high-level definition, as opposed to the proposed definition, would not appropriately serve the anticorruption and transparency objectives that Congress intended when it enacted Section 13(q).

## **8. Annual Report Requirement**

Section 13(q) provides that the resource extraction payment disclosure must be “include[d] in an annual report.” The proposed rules require an issuer to file the payment disclosure in an annual report on new Form SD, rather than furnish it in one of the existing Exchange Act annual report forms. Form SD would be due no later than 150 days after the end of the issuer’s most recent fiscal year. This should lessen the burden of compliance with Section 13(q) and the related rules because issuers generally would not have to incur the burden and cost of providing the payment disclosure at the same time that they must fulfill their

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<sup>450</sup> While it is possible that industry practice regarding the scope of resource extraction contracts could change in response to the proposed rules (e.g., by entering into contracts that cover subnational political jurisdictions), we do not believe such broad contracts reflect current industry practice. See also note 204 and accompanying discussion.

disclosure obligations with respect to Exchange Act annual reports.<sup>451</sup> An additional benefit is that this requirement would provide information to users in a standardized manner for all issuers rather than in different annual report forms depending on whether a resource extraction issuer is a domestic or foreign filer. In addition, requiring the disclosure in new Form SD, rather than in issuers' Exchange Act annual reports, should alleviate any concerns and costs associated with the disclosure being subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14.

Resource extraction issuers would incur costs associated with preparing and filing each Form SD. We do not believe, however, that the costs associated with filing each Form SD instead of furnishing the disclosure in an existing form would be significant. Requiring covered issuers to file, instead of furnish, the payment information in Form SD may create an incremental risk of liability in litigation under Section 18 of the Exchange Act. This incremental risk of legal liability could be a benefit to users of the information to the extent that issuers would be more attentive to the information they file, thereby increasing the quality of the reported information. However, we note that Section 18 does not create strict liability for "filed" information.<sup>452</sup>

Finally, the proposed rules do not require the resource extraction payment information to be audited or provided on an accrual basis. Not requiring the payment information to be audited or provided on an accrual basis may result in lower compliance costs than otherwise would be

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<sup>451</sup> For example, a resource extraction issuer may potentially be able to save resources to the extent that the timing of its obligations with respect to its Exchange Act annual report and its obligations to provide payment disclosure allow for it to allocate its resources, in particular personnel, more efficiently.

<sup>452</sup> See Exchange Act Section 18 [15 U.S.C. 78r]. A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including purchasing or selling a security in reliance on the misstatement and incurring damages caused by that reliance.

the case if resource extraction issuers were required to provide the information on an accrual basis or audited information.<sup>453</sup>

## **9. Exhibit and Interactive Data Requirement**

Section 13(q) requires the payment disclosure to be electronically formatted using an interactive data format. Consistent with the 2012 Rules, the proposed rules would require a resource extraction issuer to provide the required payment disclosure in an XBRL exhibit to Form SD that includes all of the electronic tags required by Section 13(q) and the proposed rules.<sup>454</sup> We believe that requiring the specified information to be presented in XBRL format would benefit issuers and users of the information by promoting consistency and standardization of the information and increasing the usability of the payment disclosure. Providing the required disclosure elements in a human-readable and machine-readable (electronically-tagged) format would allow users to quickly examine, extract, aggregate, compare, and analyze the information in a manner that is most useful to them. This includes searching for specific information within a particular disclosure as well as performing large-scale statistical analysis using the disclosures of multiple issuers and across date ranges.

Our choice of XBRL as the required interactive data format may increase compliance costs for some issuers. The electronic formatting costs would vary depending upon a variety of factors, including the amount of payment data disclosed and an issuer's prior experience with XBRL. While most issuers are already familiar with XBRL because they use it for their annual and quarterly reports filed with the Commission, issuers that are not already filing reports using

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<sup>453</sup> See 2012 Adopting Release, n.405 and accompanying text.

<sup>454</sup> Users of this information should be able to render the information by using software available on our website at no cost.

XBRL (i.e., foreign private issuers that report using IFRS)<sup>455</sup> would incur some start-up costs associated with that format. We do not believe that the ongoing costs associated with this data tagging would be significantly greater than filing the data in XML.<sup>456</sup>

Consistent with the statute, the proposed rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. Under the proposed rules, if multiple currencies are used to make payments for a specific project or to a government, a resource extraction issuer may choose to provide the amount of payments made for each payment type and the total amount per project or per government in either U.S. dollars or the issuer's reporting currency.<sup>457</sup> We recognize that a resource extraction issuer could incur costs associated with converting payments made in multiple currencies to U.S. dollars or its reporting currency. Nevertheless, given the statute's tagging requirements and requirements for disclosure of total amounts, we believe reporting in one currency is necessary.<sup>458</sup> The proposed rules provide flexibility to issuers in how to perform the currency conversion, which may result in lower compliance costs because it enables issuers to choose the option that works best for them. To the extent issuers choose different options to perform the conversion, it may result in less comparability of the payment information and, in turn, could result in costs to users of the information.

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<sup>455</sup> We estimate that 13 of the 471 affected issuers fall into this category.

<sup>456</sup> See Section II.G.5 above.

<sup>457</sup> See Instruction 2 to Item 2.01 of Form SD.

<sup>458</sup> See discussion in Section II.G.5 above.

#### **D. Request for Comments**

We request comment on the potential costs and benefits of the proposed rules and whether the rules, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. In particular, we request comments on the potential effect on efficiency, competition, and capital formation should the Commission not adopt certain exceptions or accommodations. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. Our specific questions follow.

71. We seek information that would help us quantify or otherwise qualitatively assess the benefits of the proposed rules. Please provide any studies or other evidence that show a causal link between transparency efforts, particularly the EITI, EU Directives or ESTMA, and societal outcomes.
72. Do smaller reporting companies account for a significant portion of the total payments made to governmental entities for the extraction of natural resources? Do emerging growth companies account for a significant portion of such payments? Generally, what is the distribution of reportable payments across issuers of different sizes? Are larger issuers more likely to make such payments as compared to smaller reporting companies or emerging growth companies?
73. We seek information that would help us quantify compliance costs (both initial and ongoing) more precisely. In particular, we invite issuers and other commenters that have had experience with the costs associated with reporting under the EU Directives to

provide us with information about those costs. What are actual compliance costs for issuers that have started to comply with regulations transposed under the EU Directives?

74. What is the breakdown of various compliance costs, such as, legal fees, direct administrative costs, information technology/consulting costs, training costs, travel costs, etc.?
75. Is our approach to cost estimates accurate? What is the proportion of fixed costs in the direct compliance costs structure of potentially affected resource extraction issuers? Would smaller resource extraction issuers incur proportionally lower compliance costs than larger resource extraction issuers? Why or why not? Would affiliated issuers be able to save on fixed costs of developing compliance systems through sharing such costs? If so, what is the estimate of such savings?
76. Is our approach to identify small issuers that likely do not make any payments above the proposed de minimis amount of \$100,000 to any government entity accurate? Are annual revenues and net cash flows from investing activities taken together an appropriate measure for such purpose?
77. What are the compliance costs of converting a resource extraction payment report in the format required by EU or Canadian regulations (e.g., XLS or PDF) to the report format required by the proposed rules (i.e., XBRL)?
78. What are the costs and benefits arising from confidential submission of the payment information? What are the costs and benefits arising from public disclosure of the payment information? How do the potential costs of public disclosure to issuers compare to its potential benefits to users of the information?

79. What are the estimated losses of projects (either total loss or fire sale discount) in the host countries that prohibit payment disclosure? Is our methodology to estimate such losses accurate? What industry-specific and country-specific factors affect the magnitude of losses in these cases and how can we quantify the impact of such factors? Are there any estimates based on the experience of issuers subject to EU or other disclosure rules that operate in such countries?
80. Are there studies on the potential effects of the proposed rules, the EU or Canadian disclosure rules, or EITI compliance on efficiency, competition, and capital formation? What are potential competitive effects of the proposed rules and how might they be impacted when the regulations promulgated pursuant to the EU Directives and ESTMA come into full effect? What fraction of international extractive companies would be affected by at least one of the U.S., EU, or Canadian rules?
81. What are the benefits and costs of an alternative reporting option for issuers that are subject to a foreign jurisdiction's resource extraction payment disclosure requirements that are determined to be substantially similar to our requirements? How much would such issuers save in compliance costs if they have the option to satisfy their filing obligations by filing the report required by that foreign jurisdiction with the Commission?
82. Are there additional benefits associated with the proposed rules? For example, would disclosure of payment information required by the proposed rules be useful to investors in smaller reporting companies who may not otherwise receive disclosure about country-specific risk? Why or why not?

## IV. PAPERWORK REDUCTION ACT

### A. Background

Certain provisions of the proposed rules contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>459</sup> The Commission is submitting the proposal to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>460</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is:

- “Form SD” (OMB Control No. 3235-0697).

Form SD is currently used to file Conflict Minerals Reports pursuant to Rule 13p-1 of the Exchange Act. We are proposing amendments to Form SD to accommodate disclosures required by Rule 13q-1, which would require resource extraction issuers to disclose information about payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to foreign governments or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Form SD would be filed on EDGAR with the Commission.

The proposed rules and amendment to the form would implement Section 13(q) of the Exchange Act, which was added by Section 1504 of the Act. Section 13(q) requires the Commission to “issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the

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<sup>459</sup> 44 U.S.C. 3501 *et seq.*

<sup>460</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including – (i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.”<sup>461</sup> Section 13(q) also mandates the submission of the payment information in an interactive data format, and provides the Commission with the discretion to determine the applicable interactive data standard.<sup>462</sup> We are proposing to require that the mandated payment information be provided in an XBRL exhibit to Form SD. The disclosure requirements would apply equally to U.S. issuers and foreign issuers meeting the definition of “resource extraction issuer.”

Compliance with the rules by affected issuers would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the collection of information.

## **B. Estimate of Issuers**

The number, type, and size of the issuers that would be required to file the payment information required in Form SD, as proposed to be amended, is uncertain, but, as discussed in the economic analysis above, we estimate that the number of potentially affected issuers is 877.<sup>463</sup> Of these issuers, we have identified 268 that may be subject to similar resource extraction payment disclosure rules in other jurisdictions by the time the proposed rules are

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<sup>461</sup> 15 U.S.C. 78m(q)(2)(A).

<sup>462</sup> 15 U.S.C. 78m(q)(2)(C) and (D).

<sup>463</sup> See Section III.A above. As discussed above, we derived 877 potentially affected issuers using data from 2014 to estimate the number of issuers that might make payments covered by the proposed rules. This number does not reflect the number of issuers that actually made resource extraction payments to governments.

adopted and 138 smaller issuers that are unlikely to make any payments that would be subject to the proposed disclosure requirements.<sup>464</sup> For the issuers subject to similar disclosure rules in other jurisdictions, the additional costs to comply with our proposed rules would be much lower than costs for other issuers.<sup>465</sup> For the smaller issuers that are unlikely to be subject to the proposed rules, we believe there would be no additional costs associated with our proposed rules. Accordingly, we estimate that 471 issuers would bear the full costs of compliance with the proposed rules, with 268 bearing significantly lower costs.

### **C. Estimate of Issuer Burdens**

After considering the comments in connection with the 2010 Proposing Release, international developments, and the differences between the proposed rules and the 2012 Rules, we have revised our PRA estimates from those discussed in the 2012 Adopting Release.<sup>466</sup> We continue, however, to derive our burden estimates by estimating the average number of hours it

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<sup>464</sup> See Section III.B.2.b above (describing in more detail how we identified issuers that may be subject to foreign reporting requirements and how we used revenues and net cash flows from investing activities to identify issuers that would be unlikely to make payments exceeding the proposed de minimis threshold).

<sup>465</sup> Under the proposed rules, a determination by the Commission that another jurisdiction's reporting requirements are substantially similar to ours would lower an issuer's compliance burden. More significantly, if the issuer is subject to the EU Directives or ESTMA it would already have gathered, or have systems in place to gather, resource extraction payment data by the time it would have to comply with the proposed rules. Although for purposes of our economic analysis the costs to the 268 issuers that may already be subject to similar resource extraction payment disclosure rules would be negligible, we have included them in our estimate of issuers for PRA purposes because under the proposed rules they would continue to have an obligation to file a report on Form SD, although with a significantly lower associated burden. See Section III.B.2.b above.

<sup>466</sup> Although the comments we received with respect to our PRA estimates related to the 2010 Proposing Release, which required the disclosure in Forms 10-K, 20-F, and 40-F, among other differences, we have considered these estimates in arriving at our PRA estimate for Form SD because, although the disclosures would be provided pursuant to a new rule and on Form SD, the disclosure requirements themselves are similar. We also believe that this is the more conservative approach given that changes from the 2010 Proposing Release and the 2012 Rules should generally reduce the burdens contemplated by those earlier releases.

would take an issuer to prepare and file the required disclosure.<sup>467</sup> In deriving our estimates, we recognize that the burdens would likely vary among individual issuers based on a number of factors, including the size and complexity of their operations and whether they are subject to similar disclosure requirements in other jurisdictions.

When determining the estimates described below, we have assumed that 75% of the burden of preparation is carried by the issuer internally and 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of \$400 per hour.<sup>468</sup> The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. In connection with the 2010 Proposing Release, we received estimates from some commenters expressed in burden hours and estimates from other commenters expressed in dollar costs.<sup>469</sup> We expect that the rules' effect would be greatest during the first year of their effectiveness and diminish in subsequent years. To account for this expected diminishing burden, we believe that a three-year average of the expected implementation burden during the first year and the expected ongoing compliance burden during the next two years is a reasonable estimate.

In connection with the 2010 Proposing Release, some commenters estimated implementation costs of tens of millions of dollars for large filers and millions of dollars for

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<sup>467</sup> As discussed above, Rule 13q-1 requires resource extraction issuers to file the payment information required in Form SD. The collection of information requirements are reflected in the burden hours estimated for Form SD. Therefore, Rule 13q-1 does not impose any separate burden.

<sup>468</sup> We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis we estimate that such costs would be an average of \$400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting. We note that no commenters provided us with an alternative rate estimate for these purposes in connection with the 2010 Proposing Release.

<sup>469</sup> See 2012 Adopting Release at Section IV.B.

smaller filers.<sup>470</sup> These commenters did not describe how they defined “small” and “large” filers. One commenter provided an estimate of \$50 million in implementation costs if the definition of “project” is narrow and the level of disaggregation is high across other reporting parameters, though it did not provide alternate estimates for different definitions of “project” or different levels of disaggregation.<sup>471</sup> We note that the commenter that provided this estimate was among the largest 20 oil and gas companies in world,<sup>472</sup> and we believe that the estimate it provided may be representative of the costs to companies of similar large size rather than smaller companies.

Generally, we note that some of the estimates we received may reflect the burden to a particular commenter, and may not represent the burden for other resource extraction issuers.<sup>473</sup> Also, while we received estimates for smaller companies and an estimate for one of the largest companies, we did not receive data on companies of varying sizes in between the two extremes. Finally, commenters’ estimates on the burdens associated with initial implementation and ongoing compliance varied widely.<sup>474</sup>

As discussed above, we estimate that 471 issuers would bear the full costs of compliance and 268 issuers may be subject to similar resource extraction payment disclosure rules by the time the proposed rules are adopted, such that the additional costs to comply with our proposed

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<sup>470</sup> See letters from API 1 and ExxonMobil 1.

<sup>471</sup> See letter from ExxonMobil 1.

<sup>472</sup> See letter from API (Oct. 12, 2010) (ranking the 75 largest oil and gas companies by reserves and production).

<sup>473</sup> For example, one commenter’s letter indicated that it had approximately 120 operating entities. See letter from Rio Tinto.

<sup>474</sup> See letter from API 1 (estimating implementation costs in the tens of millions of dollars for large filers and millions of dollars for many smaller filers). This commenter did not explain how it defined small and large filers.

rules would be much lower than costs for other issuers. We also estimate that 138 smaller issuers would bear no compliance costs because it is likely that any payments they make for the purpose of the commercial development of oil, natural gas, or minerals would be considered de minimis under the proposed rules. We have used the cost estimates provided by commenters to estimate the compliance burden for affected issuers for PRA purposes. To distinguish between the burden faced by the two groups of affected issuers described above, we have assumed that the issuers who may already be complying with a similar foreign disclosure regime would have compliance costs of approximately five percent of the issuers that bear the full costs of compliance. For issuers bearing the full costs, we note that Barrick Gold estimated an initial compliance burden of 1,000 hours (500 hours for initial changes to internal books and records and 500 hours for initial compliance).<sup>475</sup> Although we believe that initial implementation costs would increase with the size of the issuer, as discussed in our economic analysis above,<sup>476</sup> we do not have any estimates on the fraction of compliance costs that would be fixed versus variable. Also, since commenters' cost estimates were based on policy choices made in the 2010 Proposing Release, they might not reflect these commenters' views on the proposed rules. Unfortunately, we are unable to reliably quantify the reduction in these cost estimates based on the policy changes reflected in the proposed rules. Thus, despite Barrick Gold being a large accelerated filer and commenting on proposed rules that we believe would have been more onerous than our current proposals, we use its estimate of 1,000 hours as a conservative estimate

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<sup>475</sup> We use Barrick Gold's estimate because it is the only commenter that provided a number of hours and dollar value estimates for initial and ongoing compliance costs. Although in the economic analysis above we used ExxonMobil's dollar value estimate to calculate an upper bound of compliance costs, we are unable to calculate the number of burden hours for purposes of the PRA analysis using ExxonMobil's dollar value inputs.

<sup>476</sup> See Section III.B above.

pending additional input from commenters on the proposed rules and other data we may obtain on compliance burdens in similar, foreign disclosure regimes.

We believe that the burden associated with this collection of information would be greatest during the implementation period to account for initial set up costs, but that ongoing compliance costs would be less because companies would have already made any necessary modifications to their systems to capture and report the information required by the proposed rules. Two commenters provided estimates of ongoing compliance costs: Rio Tinto provided an estimate of 5,000 – 10,000 burden hours for ongoing compliance,<sup>477</sup> while Barrick Gold provided an estimate of 500 burden hours for ongoing compliance. Based on total assets, Rio Tinto is one of the largest resource extraction issuers. We believe that, because of Rio Tinto's size, the estimate it provided may be representative of the burden for resource extraction issuers of a similar size, but may not be a representative estimate for smaller resource extraction issuers. Although in terms of total assets Barrick Gold is also among the top five percent of resource extraction issuers that are Exchange Act reporting companies, it is closer in size to the average issuer than is Rio Tinto. As such, we believe that Barrick Gold's estimate is a better estimate of the ongoing compliance burden hours. We acknowledge, however, that using Barrick Gold's estimate is a conservative approach. For example, the average total assets of issuers that we

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<sup>477</sup> See letter from Rio Tinto. This commenter estimated 100-200 hours of work at the head office, an additional 100-200 hours of work providing support to its business units, and a total of 4,800 – 9,600 hours by its business units. We arrived at the estimated range of 5,000 – 10,000 hours by adding the estimates provided by this commenter ( $100+100+4,800=5,000$  and  $200+200+9,600=10,000$ ).

believe would be bearing the full costs of the rules is only 15.6% of Barrick Gold's total assets for 2014 (\$5.8 billion / \$37.4 billion).<sup>478</sup>

Thus, using the three-year average of the expected burden during the first year and the expected ongoing burden during the next two years, we estimate that the incremental collection of information burden associated with the proposed rules would be 667 burden hours per fully affected respondent  $(1000 + 500 + 500) / 3$  years). We estimate that the proposed rules would result in an internal burden of approximately 235,618 hours  $(471 \text{ responses} \times 667 \text{ hours/response} \times .75)$  for issuers bearing the full costs and 6,703 hours  $(268 \text{ responses} \times 33.35 \text{ hours/response} \times .75)$  for issuers that are subject to similar resource extraction payment disclosure rules in other jurisdictions, amounting to a total incremental company burden of 242,321 hours  $(235,618 + 6,703)$ .

Outside professional costs would be \$31,415,700  $(471 \text{ responses} \times 667 \text{ hours/response} \times .25 \times \$400)$  for issuers bearing the full costs and \$893,780  $(268 \text{ responses} \times 33.35 \text{ hours/response} \times .25 \times \$400)$  for issuers that are subject to similar resource extraction payment disclosure rules in other jurisdictions, amounting to total outside professional costs of \$32,309,480  $(\$31,415,700 + \$893,780)$ . Barrick Gold also indicated that its initial compliance costs would include \$100,000 for IT consulting, training, and travel costs. Again, we believe this to be a conservative estimate given the size of Barrick Gold compared to our estimate of the average resource extraction issuer's size. We do not, however, believe that these initial IT costs would apply to the issuers that are already subject to similar resource extraction payment disclosure

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<sup>478</sup> The average estimated resource extraction issuer's total assets compared to Rio Tinto's total assets (\$111.0 billion for 2014) is 5.3%. See note 389 above for the source of this data.

rules, since those issuers should already have such IT systems in place to comply with a foreign regime. Thus, we estimate total IT compliance costs to be \$47,100,000 (471 issuers x \$100,000). We have added the estimated IT compliance costs to the cost estimates for other professional costs discussed above to derive total professional costs for PRA purposes of \$79,409,480 (\$32,309,480 + \$47,100,000) for all issuers.<sup>479</sup> The total burden hours and total professional costs discussed above would be in addition to the existing estimated hour and cost burdens applicable to Form SD as a result of compliance with Exchange Act Rule 13p-1.

#### **D. Solicitation of Comments**

We request comments in order to evaluate: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and (5) whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.<sup>480</sup>

Any member of the public may direct to us any comments about the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments

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<sup>479</sup> We note that this PRA cost estimate serves a different purpose than the economic analysis and, accordingly, estimates costs differently. See note 390 above. One of these differences is that the economic analysis estimates average total compliance costs for affected issuers without dividing such costs between internal burden hours and external cost burdens. See Section III.B above.

<sup>480</sup> We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-25-15. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-25-15, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

#### **V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT**

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>481</sup> a rule is “major” if it has resulted, or is likely to result in:

- an annual effect on the U.S. economy of \$100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a “major rule” for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;

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<sup>481</sup> 5 U.S.C. 801 et seq.

- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment, or innovation.

## **VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS**

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed rule and form amendments to implement Section 13(q) of the Exchange Act, which concerns certain disclosure obligations of resource extraction issuers. As defined by Section 13(q), a resource extraction issuer is an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals.

### **A. Reasons for, and Objectives of, the Proposed Action**

The proposed rule and form amendments are designed to implement the requirements of Section 13(q), which was added by Section 1504 of the Dodd-Frank Act. Specifically, the proposed rule and form amendments would require a resource extraction issuer to disclose in an annual report certain information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the issuer's control to a foreign government or the United States Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. An issuer would have to include that information in an exhibit to Form SD. The exhibit would have to be formatted in XBRL.

### **B. Legal Basis**

We are proposing the rule and form amendments pursuant to Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

### **C. Small Entities Subject to the Proposed Rules**

The proposals would affect small entities that are required to file an annual report with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, and are engaged in the commercial development of oil, natural gas, or minerals. Exchange Act Rule 0-10(a)<sup>482</sup> defines an issuer (other than an investment company) to be a “small business” or “small organization” for purposes of the Regulatory Flexibility Act if it had total assets of \$5 million or less on the last day of its most recent fiscal year. The proposals would affect small entities that meet the definition of resource extraction issuer under Section 13(q). Based on a review of total assets for Exchange Act registrants filing under certain SICs,<sup>483</sup> we estimate that there are approximately 311 companies that would be considered resource extraction issuers under the proposed rules and that may be considered small entities.

### **D. Reporting, Recordkeeping, and Other Compliance Requirements**

The proposed rule and form amendments would add to the annual disclosure requirements of companies meeting the definition of resource extraction issuer, including small entities, by requiring them to provide the payment disclosure mandated by Section 13(q) in Form SD. That information must include:

- the type and total amount of payments made for each project of the issuer relating to the commercial development of oil, natural gas, or minerals; and
- the type and total amount of those payments made to each government.

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<sup>482</sup> 17 CFR 240.0-10(a).

<sup>483</sup> See Section III.B above for a discussion of how we estimated the number of “resource extraction issuers” under the proposed rules.

The same payment disclosure requirements would apply to U.S. and foreign resource extraction issuers.

**E. Duplicative, Overlapping, or Conflicting Federal Rules**

We believe there are no federal rules that duplicate, overlap, or conflict with the proposed rules.

**F. Significant Alternatives**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

- (1) Establishing different compliance or reporting requirements which take into account the resources available to smaller entities;
- (2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;
- (3) The clarification, consolidation, or simplification of disclosure for small entities; and
- (4) Use of performance standards rather than design standards.

Section 13(q) does not contemplate separate disclosure requirements for small entities that would differ from the proposed reporting requirements, or exempting them from those requirements. The statute is designed to enhance the transparency of payments by resource extraction issuers to governments and providing different disclosure requirements for small entities or exempting them from the coverage of the requirements may impede the transparency and comparability of the disclosure mandated by Section 13(q). We have requested comment as to whether we should provide an exemption or delayed compliance for smaller reporting companies.

The proposed rules would require clear disclosure about the payments made by resource extraction issuers to foreign governments and the U.S. Federal Government, which may result in increased transparency about those payments. The required electronic formatting of the exhibit would simplify the search and retrieval of payment information about resource extraction issuers, including small entities, for users of the information.

We have used design rather than performance standards in connection with the proposed amendments because the statutory language, which requires electronic tagging of specific items, contemplates specific disclosure requirements. We further believe that the proposed rules would be more useful to users of the information if there are specific disclosure requirements that promote transparent and comparable disclosure among all resource extraction issuers. Such requirements should help further the statutory goal of supporting international transparency promotion efforts.

#### **G. Request for Comment**

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- how the proposed rule and form amendments can achieve their objective while lowering the burden on small entities;
- the number of small entity companies that may be affected by the proposed rule and form amendments;
- the existence or nature of the potential impact of the proposed rule and form amendments on small entity companies discussed in the analysis; and
- how to quantify the impact of the proposed rule and form amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules themselves.

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

### **List of Subjects in 17 CFR Parts 240 and 249b**

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are proposing to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

### **PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

\* \* \* \* \*

2. Section 240.13q-1 is revised to read as follows:

**§ 240.13q-1 Disclosure of payments made by resource extraction issuers.**

(a) A resource extraction issuer must file a report on Form SD (17 CFR 249b.400) within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.

(b) Disclosure is required under this section in circumstances in which an activity related to the commercial development of oil, natural gas, or minerals, or a payment or series of payments made by a resource extraction issuer to a foreign government or the Federal Government for the purpose of commercial development of oil, natural gas, or minerals is not, in form or characterization, within one of the categories of activities or payments specified in Form SD, but is part of a plan or scheme to evade the disclosure required under this section.

(c) Definitions. For the purpose of this section the terms “resource extraction issuer,” “commercial development of oil, natural gas, or minerals,” “foreign government,” and “payment” are defined in Form SD.

#### **PART 249b – FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934**

3. The authority citation for part 249b is amended by revising the sub-authority for § 249b.400 to read as follows:

Authority: 15 U.S.C. 78a et seq., unless otherwise noted.

\* \* \* \* \*

Section 249b.400 is also issued under secs. 1502 and 1504, Pub. L. No. 111-203, 124 Stat. 2213 and 2220.

\* \* \* \* \*

4. Amend Form SD (referenced in § 249b.400) by:

a. Adding a check box for Rule 13q-1;

- b. Revising instruction A. under “General Instructions”;
- c. Redesignating instruction B.2. as B.3 and adding new instructions B.2. and B.4. under the “General Instructions”; and
- d. Redesignating Section 2 as Section 3, adding new Section 2, and revising newly redesignated Section 3 under the “Information to be Included in the Report”.

The addition and revision read as follows:

**Note: The text of Form SD does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM SD  
SPECIALIZED DISCLOSURE REPORT**

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(Exact name of the registrant as specified in its charter)

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(State or other jurisdiction of incorporation or organization)

(Commission File Number)

(I.R.S. Employer Identification No.)

---

(Full mailing address of principal executive offices)

---

(Name and telephone number, including area code, of the person to contact in connection with this report.)

Check the appropriate box to indicate the rule pursuant to which this Form is being filed, and provide the period to which the information in this Form applies:

Rule 13p-1 under the Securities Exchange Act (17 CFR 240.13p-1) for the reporting period from January 1 to December 31, \_\_\_\_\_.

\_\_\_ Rule 13q-1 under the Securities Exchange Act (17 CFR 240.13q-1) for the fiscal year ended \_\_\_\_\_.

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## GENERAL INSTRUCTIONS

### A. Rule as to Use of Form SD.

This Form shall be used for a report pursuant to Rule 13p-1 (17 CFR 240.13p-1) and Rule 13q-1 (17 CFR 240.13q-1) under the Securities Exchange Act of 1934 (the “Exchange Act”).

### B. Information to be Reported and Time for Filing of Reports.

1. \* \* \*

2. *Form filed under Rule 13q-1.* File the information required by Section 2 of this form on EDGAR no later than 150 days after the end of the issuer’s most recent fiscal year.

3. If the deadline for filing this Form occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the deadline shall be the next business day.

4. The information and documents filed in this report shall not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, unless the registrant specifically incorporates it by reference into such filing.

\* \* \* \* \*

## INFORMATION TO BE INCLUDED IN THE REPORT

\* \* \* \* \*

### Section 2 – Resource Extraction Issuer Disclosure

#### Item 2.01 Resource Extraction Issuer Disclosure and Report

(a) *Required Disclosure.* A resource extraction issuer shall file an annual report on Form SD with the Commission, and include as an exhibit to this Form SD, information relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government, for the purpose of the commercial development of oil, natural gas, or minerals. The issuer must provide a statement in the body of the Form SD that the specified payment disclosure required by this Form is included in such exhibit. The resource extraction issuer must include the following information in the exhibit, which must present the information in the eXtensible Business Reporting Language (XBRL) electronic format:

(1) The type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments for all projects made to each government;

(3) The total amounts of the payments, by category listed in paragraph (c)(9)(iii) of this Item;

(4) The currency used to make the payments;

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The governments (including any foreign government or the Federal Government) that received the payments and the country in which each such government is located;

(8) The project of the resource extraction issuer to which the payments relate;

(9) The particular resource that is the subject of commercial development; and

(10) The subnational geographic location of the project.

(b) *Alternate Reporting.* A resource extraction issuer may satisfy its disclosure obligations under paragraph (a) of this Item by including as an exhibit to this Form SD a report complying with the reporting requirements of any alternative reporting regime that are deemed by the Commission to be substantially similar to the requirements of Rule 13q-1 (17 CFR 240.13q-1). The issuer must state in the body of the Form SD that it is relying on this provision and identify the alternative reporting regime for which the report was prepared. The issuer must also specify that the payment disclosure required by this Form is included in an exhibit to this Form SD and state where the report was originally filed.

(c) *Definitions.* For purposes of this item, the following definitions apply:

(1) Business segment means a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.

(2) Commercial development of oil, natural gas, or minerals means exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(3) Control means that the resource extraction issuer consolidates the entity or proportionately consolidates an interest in an entity or operation under the accounting principles applicable to the financial statements included in the resource extraction issuer's periodic reports filed pursuant to the Exchange Act (*i.e.*, under generally accepted accounting principles in the United States (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS), but not both). A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or IFRS, and files with the Commission a reconciliation to U.S. GAAP must determine control using U.S. GAAP.

(4) Export means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. Cross-border transportation activities by an issuer that is functioning solely as a service provider, with no ownership interest in the resource being transported, would not be considered to be export.

(5) Extraction means the production of oil and natural gas as well as the extraction of minerals.

(6) Financial period means the fiscal year in which the payment was made.

(7) Foreign government means a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned by a foreign government. As used in this Item 2.01, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

(8) Not de minimis means any payment, whether made as a single payment or a series of related payments, which equals or exceeds \$100,000, or its equivalent in the issuer's reporting currency, during the fiscal year covered by this Form SD. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must consider the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

(9) Payment means an amount paid that:

- (i) Is made to further the commercial development of oil, natural gas, or minerals;
- (ii) Is not de minimis; and
- (iii) Is one or more of the following:
  - (A) Taxes;
  - (B) Royalties;
  - (C) Fees;
  - (D) Production entitlements;
  - (E) Bonuses;
  - (F) Dividends; and
  - (G) Payments for infrastructure improvements.

(10) Project means operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. Agreements that are both operationally and geographically interconnected may be treated by the resource extraction issuer as a single project.

(11) Resource extraction issuer means an issuer that:

- (i) Is required to file an annual report with the Commission pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)); and
- (ii) Engages in the commercial development of oil, natural gas, or minerals.

(12) Subsidiary means an entity controlled directly or indirectly through one or more intermediaries.

## **Instructions to Item 2.01**

### *Disclosure by Subsidiaries and other Controlled Entities*

(1) If a resource extraction issuer is controlled by another resource extraction issuer that has filed a Form SD disclosing the information required by Item 2.01 of this Form for the controlled entity, then such controlled entity shall not be required to file the disclosure required

by this Item 2.01 separately. In such circumstances, the controlled entity must file a notice on Form SD indicating that the required disclosure was filed on Form SD by the controlling entity, identifying the controlling entity and the date it filed the disclosure. The reporting controlling entity must note that it is filing the required disclosure for a controlled entity and must identify the controlled entity on its Form SD filing.

#### *Currency Disclosure and Conversion*

(2) An issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in either U.S. dollars or the issuer's reporting currency. If an issuer has made payments in currencies other than U.S. dollars or its reporting currency, it may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the issuer's fiscal year end. A resource extraction issuer must disclose the method used to calculate the currency conversion.

#### *Subnational Geographic Location Tagging*

(3) The "geographic location of the project" as used in Item 2.01(a)(10) must be sufficiently detailed to permit a reasonable user of the information to identify the project's specific, subnational, geographic location. In identifying the location, resource extraction issuers may use subnational jurisdiction(s) (e.g., a state, province, county, district, municipality, territory, etc.) and/or a commonly recognized, subnational, geographic or geological description (e.g., oil field, basin, canyon, delta, desert, mountain, etc.). More than one descriptive term may be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized, subnational geographic location. In considering the appropriate level of detail, resource extraction issuers may need to consider how the relevant contract identifies the location of the project.

#### *Entity Level Disclosure and Tagging*

(4) If a government levies a payment obligation, such as a tax or a requirement to pay a dividend, at the entity level rather than on a particular project, a resource extraction issuer may disclose that payment at the entity level. To the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, an issuer may omit certain tags that may be inapplicable (e.g., project tag, business segment tag) for those payment types as long as it provides all other electronic tags, including the tag identifying the recipient government.

### *Payment Disclosure*

(5) When a resource extraction issuer proportionately consolidates an entity or operation under U.S. GAAP or IFRS, as applicable, and must disclose payments made by such entity or operation pursuant to this Item, such payments must be disclosed on a proportionate basis and must describe the proportionate interest.

(6) Although an entity providing only services to a resource extraction issuer to assist with exploration, extraction, processing or export would generally not be considered a resource extraction issuer, where such a service provider makes a payment that falls within the definition of “payment” to a government on behalf of a resource extraction issuer, the resource extraction issuer must disclose such payment.

(7) “Processing,” as used in this Item 2.01, would include, but is not limited to, midstream activities such as the processing of gas to remove liquid hydrocarbons, the removal of impurities from natural gas prior to its transport through a pipeline, and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. It would also include the crushing and processing of raw ore prior to the smelting phase. It would not include the downstream activities of refining or smelting.

(8) A resource extraction issuer must disclose payments made for taxes on corporate profits, corporate income, and production. Disclosure of payments made for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes, is not required.

(9) Fees include license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include signature, discovery, and production bonuses.

(10) Dividends paid to a government as a common or ordinary shareholder of the issuer that are paid to the government under the same terms as other shareholders need not be disclosed. The issuer, however, must disclose any dividends paid in lieu of production entitlements or royalties.

(11) If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the issuer must disclose the payment. When reporting an in-kind payment, an issuer must determine the monetary value of the in-kind payment and tag the information as “in-kind” for purposes of the currency. For purposes of the disclosure, an issuer may report the payment at cost, or if cost is not determinable, fair market value and should provide a brief description of how the monetary value was calculated.

### *Interconnected Agreements*

(12) The following is a non-exclusive list of factors to consider when determining whether agreements are “operationally and geographically interconnected” for purposes of the

definition of “project”: (a) whether the agreements relate to the same resource and the same or contiguous part of a field, mineral district, or other geographic area; (b) whether the agreements will be performed by shared key personnel or with shared equipment; and (c) whether they are part of the same operating budget.

**Section 3 – Exhibits**

**Item 3.01 Exhibits**

List below the following exhibits filed as part of this report:

Exhibit 1.01 – Conflict Minerals Report as required by Items 1.01 and 1.02 of this Form.

Exhibit 2.01 – Resource Extraction Payment Report as required by Item 2.01 of this Form.

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the duly authorized undersigned.

\_\_\_\_\_  
(Registrant)

\_\_\_\_\_  
By (Signature and Title)\*

\_\_\_\_\_  
(Date)

\*Print name and title of the registrant’s signing executive officer under his or her signature.

\* \* \* \* \*

\* \* \* \* \*

By the Commission.

Dated: December 11, 2015

Brent J. Fields,

Secretary.